No. 2413.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN F. MEYER and
EMAR GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiffs in Error.

KERR & McCORD,
BERT SCHLESINGER,
MORRIS & SHIPLEY,
A. R. BLACK,
Attorneys for Plaintiffs in Error.

Filed this.....day of September, A. D., 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN F. MEYER and
EMAR GOLDBERG,
Plaintiffs in Error,
vs.
THE UNITED STATES OF
AMERICA,
Defendant in Error.
No. 2413

BRIEF FOR APPELLANTS.

The plaintiffs in error, Edwin F. Meyer and Emar Goldberg, were convicted of an alleged violation of section 5440 of the Revised Statutes. The judgment of the Court ordered that each of the plaintiffs in error be imprisoned for the term of fifteen months, and pay a fine each in the sum of Two Thousand ($2000.00) Dollars.

The claims which will be urged by the plaintiffs in

error and which are covered by proper exceptions and assignments of error are as follows:

I.

THE COURT ERRED IN REFUSING TO DIRECT THE JURY TO RETURN A VERDICT OF "NOT GUILTY" FOR THE REASON THAT THE ALLEGED VIOLATION OF SECTION 5440 OF THE REVISED STATUTES WAS COMPLETED ON THE 26TH DAY OF MAY, 1908, AND THE INDICTMENT WAS NOT PRESENTED UNTIL THE 31ST OF MAY, 1911.

A large number of requests for peremptory instructions as well as for a motion to dismiss were submitted to the court. See Assignments of Error, Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9, Trans., pp. 1450 to 1453, inclusive.

The same requests will be found in the instructions requested by the defendants and refused by the court. Trans., 1429-1433, inclusive.

> "I advise your returning a verdict of not guilty as to the defendant Emar Goldberg, as the evidence introduced by the Government is insufficient to warrant a verdict of not guilty. (Trans., p. 1430.)

* * * * * *

> "I advise you to return a verdict of not guilty as to Emar Goldberg as the evidence conclusively shows that the last overt act occurred more than three years before the filing of the indictment herein. (Trans., p. 1430.)

"I charge you to return a verdict of not guilty as to the defendant Emar Goldberg for the reason that the alleged violation of section 5440 (Revised Statutes of United States) was committed and completed on the 26th day of May, 1908, and the indictment in this case was not presented until the 31st day of May, 1911. (Trans., p. 1430.)

* * * * * *

"I charge you to return a verdict of not guilty as to the defendant Emar Goldberg, as the undisputed facts show that no overt act to effect the objects of the alleged conspiracy occurred within the period limited by section 1044 (Revised Statutes of United States).

* * * * * *

"I charge you that the alleged defense in this case was ended on the date of delivery of the check in question, to wit, on the 26th day of May, 1908, and was barred by the statute of limitation on the 26th day of May, 1911. (Trans., p. 1431.)

* * * * * *

"I charge you before you can return a verdict of guilty you must find that an overt act occurred within three years of the filing of the indictment herein. In this connection, I charge you that an overt act is an act done to effect the objects of the conspiracy; settlements between the alleged conspirators or with agents for profits, are not overt acts. (Trans., p. 1431.)

"I charge you that under the laws of the United States, an indictment charging an offense, to wit, a conspiracy to defraud the United States, must be presented within three years from the time of the commission of the offense, and if you find from the evidence in this case, that the indictment presented herein was not presented within three years from the date of the commission of the offense, or if you have a reasonable doubt, then it would be your bounden duty to return a verdict of not guilty. (Trans., p. 1432.)

* * * * * *

"I charge you that if you have a reasonable doubt as to whether or not the alleged offense here complained of, was committed within three years of the time of the presentment of the indictment herein, it would be your duty as sworn jurors to give the defendant the benefit of such doubt and return a verdict of not guilty. (Trans., p. 1432.)

* * * * * *

"I charge you that the defendant is entitled to interpose any defense allowed him by the law, and this includes the defense of the Statute of Limitations, and you should not be prejudiced against the defendant in the course of such defense; and I further charge you before you can find the defendant guilty, you must find from the evidence beyond all reasonable doubt, that the offense, if committed, occurred within three years from the date of filing of indictment herein. (Trans., p. 1432.)

A. The conspiracy ended with the delivery of the check to the plaintiffs in error on May 26, 1908,

which was more than three years prior to the filing of the indictment.

(1) The testimony shows that May 26th, 1908, was the date of the delivery of the check.

(2) All acts subsequent to May 26, 1908, were private arrangements between the parties to the conspiracy, all subsequent use of the check whether by depositing same or cashing same, had nothing to do with the substantive offense.

B. The statute of limitations runs from the date of payment by check.

C. After May 26th, 1908, the conspiracy ceased to be a continuing offense; and became a completed conspiracy with a continuing result.

(1) The object of the conspiracy, even conceding that it was the receipt of the check, was effected on May 26th, 1908, the date of the delivery thereof to the defendants.

(2) The distinction between a continuing offense and a completed offense with a continuing result is well illustrated by the cases herein cited and quoted from.

(3) The retention of the check from May 26th to June 2, 1908, could not continue the crime.

(4) But the real object of the conspiracy as expressed in the indictment itself, was to

suppress bidding and enable the plaintiffs in error to secure the award, and that object was effected long prior to the 26th of May, 1908.

(5) The substantive offense was completed with the acquisition of the check by the defendants.

(6) The last overt act must have occurred prior to the receipt of the check, for the overt act cannot succeed the completion of the contemplated crime.

D. According to the terms of the indictment, and of all rules of common sense, the object of the conspiracy was attained by the receipt of the check, because the check constituted payment, and no further relations with the Government were necessary after its delivery.

E. There is no dispute as to the date of delivery of the check, although the indictment charged this date as on or about June 1st, 1908, the evidence both of the Government and defendant showed that it occurred on May 26th, 1908.

II.

THE COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE PERSISTENT OBJECTIONS OF THE PLAINTIFFS IN ERROR TO EVIDENCE AS TO SALES OF ZINC AT VARIOUS TIMES TO VARIOUS PURCHASERS, FOR THE PURPOSE OF ESTABLISHING THE REASONABLE VALUE OF THE ZINC SOLD TO THE GOVERNMENT.

A. It was not shown by the government that the other sales offered by it in evidence took place under the same conditions or were subject to the same circumstances as the sale of the zinc in question. On the contrary the conditions and circumstances were shown by the evidence to be fundamentally different.

B. Mr. House, by whom this testimony was produced, was an expert accountant, and was not an expert in or competent to testify as to the market value of zinc.

III.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE CONVICTION.

A

THE INDICTMENT.

DUTIES OF MR. MEYER.

The indictment was presented and filed in the United States Circuit Court for the western district of Washington, western division, on May the 31st, 1911. It charges that on the 2nd day of June, 1908, and for a long time prior thereto, the plaintiff in error, Edwin

F. Meyer, was principal clerk in the office of the general store keeper of the United States Navy Yard at Puget Sound, Washington. That pursuant to certain rules and regulations he was vested with sundry powers, duties and discretions, in determining from time to time the minimum amount of supplies of various kinds and descriptions which should be kept on hand at Puget Sound for use at the navy yard; in proposing and recommending from time to time the purchase of various kinds of supplies; in suggesting and issuing requisitions for the purchase thereof; in recommending the approval of such requisitions by superior officers; in suggesting the estimated cost of supplies specified in requisitions; in suggesting and fixing the time designated in the requisitions within which the successful bidder would be required to deliver such supplies; and in giving out information regarding requisitions and recommending the acceptance or rejection of such supplies by the storekeeper in charge.

DUTIES OF MR. KETTLEWELL.

That on the 2nd day of June, 1908, and for a long time prior thereto, one J. A. Kettlewell was chief clerk to the Navy Pay Officer at Seattle, Washington, and pursuant to certain rules and regulations he was vested with sundry powers and discretions, and among others with the power, duty and discretion in suggesting the disposal of, and disposing of the requisitions for sup-

plies received from the store keeper of the Navy Yard at Puget Sound; in giving notice to the public that competitive proposals and bids would be received by the pay master of the United States at Seattle, Washington, for the purchase of supplies for the store keeper, and the preparation of and sending out to the public of proposals containing specifications of the supplies covered by such requisitions; in suggesting and devising ways and means of receiving bids and proposals; in recommending the award of contracts to successful bidders; in suggesting the approval or rejection of accounts rendered by such successful bidder, as such account should be fair and honest or false and fraudulent; in suggesting and recommending *the payment or non-payment of such amounts so claimed by such successful bidder to be due him for such supplies furnished, according as such claim should be fair and honest or false and fraudulent;* IN SUGGESTING AND CAUSING TO BE ISSUED, MAILED AND DELIVERED, AND IN ISSUING, MAILING AND DELIVERING, TO THE SUCCESSFUL BIDDER, THE CHECK OF THE PAY MASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER, FOR SUPPLIES SO FORWARDED TO THE STORE KEEPER AT THE NAVY YARD AT PUGET SOUND, WASHINGTON.

AVERMENTS AS TO GOLDBERG.

That on the 2nd day of June, 1908, and for a long time prior theerto, Goldberg was a resident of Seattle, and manager of the Seattle branch of the Great Western Smelting & Refining Company, a corporation having offices in San Francisco, Chicago, Seattle, Los Angeles, and various other cities, such branch being engaged in the business of buying and selling iron, tin, zinc, and kindred articles.

AVERMENTS AS TO W. A. CORDER.

That on the 2nd day of June, 1908, Corder was a resident of Seattle, and was the manager of a mercantile business operating under the firm name and style of W. A. Corder & Company, engaged in the business of buying and selling machinery supplies.

AVERMENTS AS TO SILVERSTONE.

That on the 2nd day of June, 1908, one E. Silverstone was a resident of Seattle, Washington, and was engaged in conducting a hotel known as the "Herald," located in Seattle.

AVERMENTS OF CONSPIRACY.

That on or about THE SECOND DAY OF JUNE, 1908, EDWIN F. MEYER AND J. A. KETTLEWELL DID UNLAWFULLY AND MALICIOUSLY CONSPIRE WITH SAID EMAR GOLDBERG, W. A. CORDER AND E.

SILVERSTONE TO DEFRAUD THE UNITED STATES OF DIVERS LARGE SUMS OF MONEY BY MEANS OF A CERTAIN FRAUDULENT SCHEME, DEVISED BY SAID MEYER, KETTLEWELL, GOLDBERG, CORDER AND SILVERSTONE, AND WAS THEN AND THERE IN PROCESS OF EXECUTION BY THEM; THAT SAID FRAUDULENT SCHEME WAS, AS DEVISED BY SAID DEFENDANTS, ON OR ABOUT THE FIRST DAY OF APRIL, 1908, IN PROCESS OF EXECUTION, AND WAS CONTINUOUSLY IN PROCESS OF EXECUTION FROM SAID FIRST DAY OF APRIL TO AND INCLUDING THE SECOND DAY OF JUNE, 1908, and was thereafter in process of execution by said defendants in their acts tending to effect the object of the conspiracy.

That the said fraudulent scheme contemplated that, as the said Great Western Smelting and Refining Company had on hand on, to-wit: THE FIRST DAY OF APRIL, 1908, A LARGE STOCK OF ZINC, THE SAID MEYER SHOULD, WITH FRAUDULENT INTENT, CAUSE TO BE ISSUED BY THE UNITED STATES NAVY YARD A REQUISITION FOR THE PURCHASE FOR USE AT SAID YARD OF A LARGE QUANTITY OF ZINC, etc., and should place in said requisition, as the estimated cost price of said zinc, a price in excess of

the fair market value of the same, and should place in the requisition as the time in which the successful bidder should deliver the said zinc to said Navy Yard, so short a time of delivery that only merchants in Seattle could comply with the requirements, and so that only merchants of Seattle would be able to furnish the same, and would be unable to enter into competition for the contract; and should, with like fraudulent intent, so draft the specifications contained in the requisition as to the kind and quality of said zinc, etc., that only the Great Western Smelting & Refining Company and the said W. A. Corder Company could comply with the requirements.

That from time to time the said Meyer should notify the plaintiffs in error of the progress of such requisition so that they would be able to prevent legitimate competition.

That Silverstone, without authority so to do, should ostensibly represent the Fowler Metal Company, but actually represent the Great Western Smelting & Refining Company and said W. A. Corder Company, and should at the proper time file with the United States Navy Yard a proposal and bid to furnish at prices in excess of the market value, the said zinc, etc., so to be requisitioned for use at the Navy Yard, purporting to be the proposal and bid of the Fowler Metal Company, but to be in reality the bid of Silverstone, and for the Great Western Smelting & Refining Company and the W. A. Corder Company; that when said requisition

should reach the United States Navy Pay Office, said Kettlewell should send out proposals containing specifications of the articles so desired to be purchased for use at the Navy Yard, to a list of merchants in Seattle, which lists should contain the names of no other merchants than the Great Western Smelting & Refining Company, W. A. Corder & Company, and the Fowler Metal Company, except the names of such merchants known by said Kettlewell to be unable to furnish the articles.

Said Kettlewell should, with fraudulent intent, examine the bids so thereafter to be received at the United States Navy Office, and should ascertain whether or not, in fact, any merchants other than the Great Western Smelting & Refining Company, the Corder Company or the Fowler Metal Company had bid thereon, and if so, to manipulate and order such other bids so that the contract should be awarded to the Great Western Smelting & Refining Company, the W. A. Corder Company, or the Fowler Metal Company.

Said Kettlewell should recommend to the paymaster of the United States Navy Pay Office, and arrange to have accepted, the bid or proposal of the Fowler Metal Company, to be offered and filed by Silverstone; should arrange to have awarded to said Fowler Metal Company the contract for the furnishing of said zinc; that Meyer should arrange to have the zinc which would be forwarded to the United States Navy Yard by said Great Western Smelting & Refining Company and the W. A. Corder Company in fulfillment of the Fowler

Metal Company's contract ACCEPTED WITHOUT QUESTION AND SAID KETTLEWELL SHOULD RECOMMEND AND SECURE THE APPROVAL OF THE ACCOUNT AS SHOWN BY A CERTAIN CERTIFIED BILL TO BE FILED BY SAID SILVERSTONE WITH THE UNITED STATES NAVY YARD AT PUGET SOUND, WASHINGTON, PURPORTING TO BE THE CERTIFIED BILL OF THE FOWLER METAL COMPANY, SHOWING DELIVERY OF THE SAID ZINC AND ACCEPTANCE OF SAME AT THE SAID NAVY YARD, AND SHOULD THEREUPON RECOMMEND AND SECURE THE ISSUANCE BY THE PAYMASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, OF A CHECK PAYABLE TO THE ORDER OF SAID FOWLER METAL COMPANY, FOR THE AMOUNTS APPEARING TO BE DUE THE SAID FOWLER METAL COMPANY, ACCORDING TO THE ACCOUNT RENDERED, AND SHOULD ARRANGE TO HAVE THE CHECK DELIVERED TO SAID E. SILVERSTONE OR SAID GOLDBERG.

It is then averred that the object and purpose of the conspiracy was that the said Meyer and Kettlewell should so exercise their powers that there should be no real competition on the contract to supply said zinc, but that the contract should be obtained by either the

Great Western Smelting & Refining Company or the Fowler Metal Company, but secretly for the benefit of the Great Western Smelting & Refining Company and W. A. Corder & Company.

It is further stated that the object and purpose of the conspiracy was that the United States should pay for the said zinc, rolled sheets and boiler plates an amount greatly in excess of its real value, and said conspirators should obtain for themselves an unreasonable profit from the sale of said zinc and said unreasonable profits so realized should be divided amongst them in proportions to the Grand Jurors unknown.

AVERMENTS OF OVERT ACTS.

Then follow the averments of overt acts.

1. That on or about the 1st day of June, 1908, said Kettlewell delivered to Emar Goldberg a certain check in words and figures following, to-wit:

"No. 82 U. S. Navy Pay Office,
Seattle, Washington, May 26th, '08.

United States Depositary. The Seattle National Bank, Seattle, Washington.
United States Depositary.

State Object for which Drawn Zincs. 1725 Pay to Fowler Metal Co. or { order / ~~bearer~~

Seventy-four Hundred and Seventeen 09/100 Dollars ($7,417.09).

ROBERT H. ORR,
Paymaster, U. S. N."

2. That on or about the 1st day of June, 1908, said Kettlewell delivered to Silverstone the same check.

3. That on or about the 1st day of June, 1908, Emar Goldberg had in his possession the same check, and did, with fraudulent intent, write upon the back thereof: "Pay to the order of E. Silverstone, FOWLER METAL COMPANY, per E. S. Fowler, Treasurer and Manager."

4. That on or about the 1st day of June, 1908, so having said check in his possession, said Emar Goldberg did knowingly cause to be delivered to one E. Silverstone the said check.

5. That on or about the 1st day of June, 1908, the said E. Silverstone so having the said check in his possession, did write upon the back of said check an endorsement: "E. Silverstone."

6. That on or about the 1st day of June, 1908, said E. Silverstone, so having said check in his possession, did deposit it in the First National Bank to his credit.

7. That on or about the first day of June, 1908, said Silverstone did issue a check on the First National Bank to the order of the Great Western Smelting & Refining Company in the sum of $7,417.09, and delivered it to Emar Goldberg.

8. That on or about the 1st day of June, 1908, said Emar Goldberg had in his possession the said last named check and so having it in his possession, did endorse on the back of the check the name of the Great Western Smelting & Refining Company, and did deposit the said

check to the credit of the Great Western Smelting & Refining Company, in the National Bank of Commerce of Seattle.

This, we submit, is an accurate analysis of the substantial averments of the indictment, including the overt acts. It will be observed that the indictment in this case was not filed until May 31st, 1911.

It will also be observed that the pleader has fixed the time of the alleged conspiracy as "on or about the second day of June, 1908," and has fixed the date of the delivery of the check of the Government as "on or about the first day of June, 1908."

B

STATEMENT OF FACTS.

The evidence in this case upon which the defendants have been convicted is almost solely that of the witness, J. A. Kettlewell. The defendants' case rests solely upon the testimony of the defendant Edwin F. Meyer and the defendant Emar Goldberg. A presentation of the evidence of Kettlewell and a presentation of the evidence of the defendants Goldberg and Meyer will bring to the court's attention all the necessary facts in this case.

TESTIMONY OF J. A. KETTLEWELL.

The evidence of the witness J. A. Kettlewell, upon

which, as has been stated above, the prosecution depends for its support of the verdict in this case is as follows:

DIRECT EXAMINATION.

On direct examination, for the United States, it appears that the said J. A. Kettlewell was indicted with the other defendants, pleaded guilty, and received a pardon in this case so as to permit him to testify. He became associated with the Puget Sound Navy Yard in 1902. (Trans., p. 314.) Remained at the Puget Sound yard until about December, 1906, and in December, 1906, withdrew from the Puget Sound Navy Yard and became associated with the Paymaster's Department of the Government, at Seattle, and remained in the Paymaster's department until March 28, 1911. (Trans., p. 314.) On or about March 28th, 1911, he entered the Navy Pay Office in Seattle under Paymaster Orr.

DUTIES AS CHIEF CLERK TO PAYMASTER.

The duties of Kettlewell as chief clerk included the general supervision of the office, and as chief clerk he served under various paymasters. (Trans., p. 315.) He continued in the office until the time of his arrest as chief clerk of the paymaster. He further testified that he was thoroughly familiar with the storekeeper's office at Bremerton, and with the general routine that followed in the preparation of requisitions, and was thoroughly familiar with all matters connected with

bidding for supplies for the navy. (Trans., p. 320.) Amongst his duties as chief clerk to the paymaster, he was to examine requisitions; that all proposals for bids were sent out by said Kettlewell as clerk, by himself directly, or under his supervision.

DEALINGS BETWEEN GOLDBERG AND KETTLEWELL.

Kettlewell further testified that Meyer stated to him that Goldberg would "make it right" if he got any business, but that until the first part of 1908 Goldberg had not "made it right" with him. That the said Kettlewell continuously complained that Goldberg had not settled with him, and that on or about the 11th day of January he refused a voucher for an excessive amount of zinc. (Trans., p. 270.) That shortly thereafter a requisition was issued for 4000 pounds of zinc, and the same was passed, and the voucher paid therefor. Check was issued and delivered to the Great Western Smelting and Refining Company. Thereafter Kettlewell again complained to Meyer that Goldberg had not settled with him, and three or four days thereafter Goldberg came to Kettlewell's office and handed him $100, saying, "This will straighten old matters up and that Meyer is going to make a big requisition as soon as he can, and I want everything straightened up before that comes through." (Trans., p. 278.) And that he would be willing to divide on the basis of twenty per cent to Meyer and twenty per cent to Kettlewell.

Mr. Kettlewell further testified that shortly after he

had been given the $100 by Goldberg a requisition was issued for 50,000 pounds of zinc, requisition No. 438, Navy Yard of Puget Sound for 1/2 by 6 by 12 plate. When he received this requisition he telephoned to Mr. Goldberg and told him it was agreed he should hold it a couple of days before sending it out. Meanwhile the proposals were made out. Mr. Goldberg stated that there was another party who he desired to bid on this requisition—that he did not desire to split up the profits with half a dozen people, but was unable to give the identity of the bidder at the time. Later a party came to the office, representing the Fowler Metal Company, and asked for a set of proposals to submit and bid on this zinc. A set of proposals was mailed direct to W. A. Corder Company and others.

PROPOSALS AND BIDS FOR THE REQUISITION IN QUESTION.

Proposals were taken to P. McManus, Pacific Engineering Company, Schwabacher Hardware Company, Union Sound Machinery Depot, Seattle Hardware Company, and Hallidie Machinery Company. To all of these dealers attention was particularly directed by Kettlewell to the fact that it must be furnished within five days and the dealers said that they could not furnish it within that time. The bids received in reply to proposals for requisition No. 438 were: Fowler Metal Company, put in by Mr. Silverstone; Great Western Smelting and Refining Company, signed by

Emar Goldberg. All these were dated April 11th. The American Iron & Metal Company also made a bid, a proposal having been mailed to them by the witness, at the request of Mr. Goldberg. The Fowler Metal Company bid $12.45 per hundred weight, and were the successful bidders; the Great Western Smelting & Refining Company being next, having bid 12½ cents per pound. Some of the other companies bid, but the other bids were put in at Kettlewell's suggestion. Mr. Corder protested against the award being made to the Fowler Metal Company, saying: "That man does not represent the Fowler Company or anybody else but Jimmie (Goldberg)."

TESTIMONY THAT CHECK WAS DELIVERED ON MAY 26, 1908.

The witness stated that the check came through in the usual course and A CHECK WAS ISSUED THEREFOR ON MAY THE 26TH, 1908, AND DELIVERY OF THIS CHECK TO GOLDBERG OCCURRED ON THE SAME DAY, TO-WIT: MAY THE 26TH, 1908. (Trans., pp. 306, 307.) Some time thereafter Kettlewell was given $350, as part profit of the zinc transaction. It further appears, (Trans., p. 312), that the requisition No. 438, as it came over from the Navy Yard, called for delivery within fifteen days, whereas the proposals called for delivery within five days, and that the change was made by Kettlewell at the suggestion of Mr. Goldberg.

CROSS-EXAMINATION.

Under cross-examination it appears from the statements of the witness that the said Kettlewell was practically in entire charge of the office of the Paymaster at Seattle; that on numerous occasions long prior to having met Goldberg the said Kettlewell changed and altered bids of merchants submitted for various supplies, and after they were changed they were submitted to the paymaster, such changes always being made by Kettlewell very slowly and carefully in order to disguise his handwriting.

HE FREQUENTLY CHANGED BIDS.

The witness stated that he frequently changed bids. "There is no question about that." (Trans., p. 327.) It appears that the present special attorney was the attorney for the witness Kettlewell, approximately seven indictments having been brought by the grand jury against the said Kettlewell.

HE OPERATED UNDER THE NAMES OF NUMEROUS FICTITIOUS CONCERNS OF WHICH THE OTHER DEFENDANTS WERE TOTALLY IGNORANT.

The witness Kettlewell pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Peter Brandt transaction;" he pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Smith-Hunt Transaction;" Smith-Hunt & Co. being

a fictitious concern under which name, he, Kettlewell, operated; that he also pleaded guilty to an indictment charging him with defrauding the government in what is known as the "Lyman-Evans Transaction." From this last named transaction he received the sum of $1,012.70. The witness further testified as to a transaction having occurred while he was chief clerk of the Paymaster's office, in relation to a bid that had been submitted by Miles Piper & Co., which the witness raised and passed up to the chief paymaster thereafter. (Trans., pp. 334, 335, 337.) He further stated that there was no such firm as "Lyman-Evans and Company," and that it was solely fictitious. (Trans., pp. 393, 394.) That each and every transaction that took place between the witness Kettlewell and Lyman-Evans & Company was a fraudulent transaction. That after the said Kettlewell had placed a requisition, the said Kettlewell in his official capacity issued proposals to numerous persons for the supply thereof, and thereafter put in a proposal as a representative of Lyman-Evans and Company; thereafter said proposal was awarded to said Lyman-Evans and Company, a fictitious firm, standing solely for the witness Kettlewell, and that the said witness thereafter received from the government through the fictitious Lyman-Evans and Company the money in payment of said supplies.

HE OPENED THE BIDS OF OTHER COMPANIES.

It appears from the witness' statements that he

opened bids, of other firms, who were bidding against him, in order to underbid them. (Trans., p. 398.) That he borrowed $155 from the defendant Meyer shortly after he entered the government service in 1902, and that he gave the said Meyer a note for the sum, which note, he testified, had been destroyed, but it appears that the said note had never been destroyed. (Trans., p. 401.) The same facts testified to as having occurred in the Lyman-Evans transaction, occurred also in the Smith-Hunt transaction, in which the witness Kettlewell sold from himself to the government two thousand feet of single chain, although the requisition called for only one thousand feet. (Trans., p. 405.) These transactions occurred quite often. All letters relating to these fictitious concerns and transactions were addressed to the place of residence of Mr. Kettlewell's sister. It further appears that the witness never obtained permission from the government to enter into competition for sales of supplies to the government. (Trans., p. 414.) Also that the witness never conferred with Mr. Goldberg about creating the firm of Lyman-Evans & Co., or Smith-Hunt and Company, nor did he consult Mr. Goldberg when the said Kettlewell transacted business with the government under the name of Peter Brandt, and at no time consulted with Mr. Goldberg about the sale of supplies to the government under the names of these various fictitious concerns, the creation of the witness Kettlewell. It further appears that he never disclosed to any merchant in Seattle that he

was engaged in furnishing the Government with supplies, nor that he was competing with them in government business, and that the fictitious firms hereinbefore enumerated had no capital. (Trans., pp. 414, 415, 416.) He further testified that under the names of these fictitious concerns between 1908 and 1911, he sold various and sundry quantities of goods to the United States government. (Trans., p. 416.) It further appears from his statements that the witness Kettlewell had a working contract agreement with a Mr. Wheeler, representing the Perine Machinery Company; that the said Kettlewell was to get sixty per cent of the profit going to that concern for sales to the Navy Yard; and that he had a great many transactions with Mr. Wheeler for the Perine Machinery Company, the number of which he could not estimate. (Trans., p. 426.)

The witness testified further to having on occasion raised the bid of the Perine Machinery Company for potato peelers, and that he ordered, "at his own sweet will and without consultation with superior officers, whenever it suited his purpose."

SYSTEMATIC DECEPTION OF GOVERNMENT FOR YEARS.

That he systematically deceived the paymaster and the government officials for years and years, but in none of this systematic thievery has he connected Goldberg and Meyer, with the exception of the instances set forth in this indictment.

The testimony of Mr. Kettlewell thus summarized

states the case of the government against the defendants. Certain evidence was introduced as to a certain private account of the defendant Goldberg, but it is unnecessary to relate this here, as the direct and cross-examination of the defendant Goldberg brought out all the facts relating to the book accounts which the government claims tend to prove the guilt of the defendants.

TESTIMONY OF EMAR GOLDBERG.

DIRECT EXAMINATION.

EMAR GOLDBERG testified to having become engaged as a manager or agent of the Great Western Smelting and Refining Company at Seattle in 1903, at a salary of $175 per month, (Trans., p. 683), but that he had never been a member of the board of directors of that concern or of any subsidiary corporation of that company. In the year 1908 he was getting a salary of approximately $4000 a year, together with a drawing account by way of an extra allowance, which drawing account amounted to $83.44 per month. This drawing account was to extend over a period of five years from the 1st day of April, 1908. (Trans., p. 685.) That at that time he was involved in the lumber business. Mr. Alpers, the Vice President of the Great Western Smelting and Refining Company permitted him to withdraw any amount at any time he desired not to

exceed $5000. This drawing account was given to the witness Goldberg in lieu of commissions which he had previously received, commissions being thereafter cut off, and this bonus account being substituted in place thereof.

ACTED UNDER THE DIRECTION OF MR. ALPERS.

In the latter part of 1907 or the early part of 1908, February and March, the witness first became aware of the fact that the Atlantic fleet was coming to the Pacific Coast. (Trans., p. 690.) And in connection with the coming to the Coast of the Atlantic fleet he discussed with Mr. Alpers at the time he was here (in April, 1908), the probability of the fleet requiring zinc boilers, and also in connection therewith he discussed whether it was advisable to purchase another car of zinc from Matheson-Heggler Company. (Trans., pp. 692-693.) Mr. Alpers stated that he thought it advisable to exercise the option of another car of zinc, irrespective of whether or not the government bought the case, as the price was so low that no money could possibly be lost on it, and further instructed the witness to ask 12½c for this zinc (Trans., p. 696), because as long as the Great Western Smelting and Refining Company had an option on this zinc nobody would be in a position to supply this to the government, and furthermore, it did not make any difference whether they got the order or not, because the zinc would be worth the money. Mr. Alpers approved putting a bid at approximately 12½c, but at the

same time to use discretion. About this time the witness had a discussion with Mr. Alpers about Mr. Kettlewell, the chief clerk of the paymaster's office, who was continually bothering him (the witness) for money. Mr. Alpers thereupon said that it would be best to bid in another name than that of the Great Western Smelting and Refining Company, so that Kettlewell would not further bother the Great Western people, and suggested bidding in the name of the Fowler Metal Company, which was a subsidiary of the Great Western Smelting and Refining Company. Mr. Alpers said that he would speak to Mr. Fowler about it and let the witness know. (Trans., p. 697.) The witness personally had no interest whatsoever in the Fowler Metal Company. At about this time the witness took up with Mr. Kerr, the counsel for the Great Western Smelting and Refining Company, and counsel in this case (Trans., p. 699), the question of Kettlewell's importunities for money. Mr. Kerr advised him not to make any trouble about it, and said it was best not to loan him any more money and try to get back what the witness had advanced him. Mr. Kerr also related that as long as Mr. Alpers would be up in a few days it was best to await his coming before taking any action. On the morning of April 11th, 1908, the Navy Paymaster telephoned the witness that there was a proposal for 50,000 pounds of zinc plate; so the witness went up to the navy office to get this proposal. (Trans., p. 700.) The witness was asked by Mr. Kettlewell what we intended to bid.

Thereupon, by instruction from Mr. Alpers, the witness stated about 13 cents.

KETTLEWELL BOTHERS HIM FOR MONEY.

In the month of December, 1907, Mr. Kettlewell had asked the witness to loan him $1000, and at numerous other times, even going so far as to go to the witness's house (Trans., p. 702-3), for money. All the money the witness loaned him was before Mr. Alpers came to Seattle. (Trans., p. 701.) At the time Mr. Kettlewell asked the witness for $1000, and upon his refusing to give it to him, Kettlewell told the witness that if he was not accommodating he would see to it that the Great Western Smelting and Refining Company did not do any more business with the Navy Yard. To which the witness in effect replied that that would not make any difference as he could not give him any money. (Trans., p. 704.)

The witness stated that Kettlewell continually reiterated that the Great Western Smelting and Refining Company were getting more business than they were entitled to, and that whereas other people were treating him right, he expected the same treatment from the Great Western people. He further stated that he loaned Kettlewell $225, in three sums of $75 each, which sums have never been repaid. (Trans., p. 705.) That the bonus account referred to and which the government explained as sums having been given by the witness Goldberg to Kettlewell, were sums drawn by the wit-

ness from his personal drawing account, and invested by him in personal matters, and without any reference whatsoever to any government transaction, and none of the sums drawn from this account were ever paid to the witness Kettlewell, Meyer, or any other government employee by way of commissions or profits, or for any other purpose, and were all legitimate expenditures by the witness. (Trans., pp. 707, 708.)

NO ARRANGEMENT WITH EITHER KETTLEWELL OR MEYER AS TO SHARING IN PROFITS OF GREAT WESTERN S. & R. CO.

The witness further testified that there were never any arrangements with Kettlewell or Meyer whereby twenty per cent of the profits of the Great Western Smelting & Refining Company from their transactions with the government were to be paid to either Kettlewell or Meyer (Trans., pp. 709, 710) ; that no authority, express or implied, had been given, nor was any such scheme ever entered into. The witness had never before heard of, or had any transaction with Lyman, Evans & Company, Smith, Hunt and Company, Peter Brandt, Peter McManus, or any other fictitious concern (Trans., p. 711), which Mr. Kettlewell employed in defrauding the government.

PRICE OF ZINC IN QUESTION NOT EXORBITANT.

The witness further testified that on numerous occasions the Great Western Smelting & Refining Com-

pany had sold to the Government zinc at 16c a pound, or at an increase of 25 per cent. over the price charged for the zinc, which it is claimed in the indictment the defendants conspired together to sell to the Government at exorbitant prices. In fact, the witness testified that whereas the Great Western Smelting & Refining Company received from the Fowler Metal Company, a subsidiary thereof, 12½c for the zinc set forth in the present indictment, on numerous occasions they had received 13c, 14c, 15c and 16c, (Trans., p. 720), and that these high prices had been authorized by the officials of the navy, and, in fact, by the acting secretary of the navy himself (Trans., p. 737). Sales at these prices were made prior and subsequent to the indictment brought in this case, and in no instance was any question raised by the government. The witness further stated that the excess of 9000 pounds had been included in the 50,000 pound requisition, as the witness and Corder had decided that the worst that could happen was that the Government would reject the 9000 pounds. Otherwise, they felt that it would be used for the battle-ship fleet which was about to come to the navy yard. (Trans., p. 722.)

The witness denied ever having called Kettlewell out in the hall, as Kettlewell testified, and having given him $100, or as having said to him words to the effect that "this will straighten matters up, and that a big requisition would be sent through by Meyer." (Trans., p. 750.) He denied that he ever had any agreement

of any kind or character as to profit-sharing from Government transactions.

CROSS-EXAMINATION.

DIVISION OF PROCEEDS.

On cross-examination, the witness Goldberg said that there had been an award to the Great Western Smelting & Refining Company in December, 1907, for the sale of zinc to the government at 16c a pound, and that 4000 pounds were called for by the requisition, but approximately 5933 pounds were delivered. (Trans., p. 771.) The excess was afterwards bought by the government at 12½c a pound. He further stated that the expenditure of $100 shown on the books of the Great Western Smelting & Refining Company, for which there was no accounting, was never paid to Mr. Kettlewell. (Trans., p. 773.) That in all likelihood the $100 check referred to and payable to cash was for a Mr. Block, a man who was traveling for the company, who might have asked for the check to be made to cash. (Trans., p. 775.) He further testified to having divided the proceeds of the transaction in the indictment in controversy with the W. A. Corder Company, as per agreement with the Great Western Smelting & Refining Company, whereby the two companies were to divide the profits of these various transactions. (Trans., p. 831.)

KETTLEWELL'S IMPORTUNITIES FOR MONEY.

The witness again testified to having been continually importuned by Kettlewell to loan him money, and had numerous conversations with him in January and February of 1908, as a result of which he finally loaned him $75 on three different occasions, making in all the sum of $225. After having loaned him the money, Kettlewell again called the witness up, and the witness stated that that was all he could afford to loan him, and then he went to see Mr. Kerr, as previously testified. Mr. Goldberg testified to having loaned Mr. Kettlewell this money for the reason that he had been "worrying the life out of him."

TESTIMONY OF EDWIN F. MEYER.

EDWIN F. MEYER testified in substance as follows:

DIRECT EXAMINATION.

That he had been connected with various departments of the government service; that he was first connected with the store-keeper's department, and later on taken into the pay-master's department. (Trans, p. 901.) He stated that during the spring of 1908 he was in charge, as chief clerk, of the general store-keeper's office and in general charge of all duties connected with the requisitioning of supplies. (Trans., p. 908.) He stated that the system of requisitioning supplies was for the department to get information wherever possible,—

whether from the various government officials, supply merchants, or catalogues, or elsewhere,—as to the probable price which the government would have to pay for these materials, and to place in these requisitions the estimated prices. It often times happened that the estimated prices were 25 to 50 per cent higher than that which the government actually paid for the materials. There was always considerable difficulty in estimating the prices. It almost invariably happened that the goods were purchased for less than the estimated prices. (Trans., p. 946.) Often times when early deliveries were essential, as high as 14c a pound was paid for nuts, which under normal conditions, could have been purchased for 4c a pound. (Trans., p. 954.)

LARGE SUPPLY OF ZINC NECESSARY FOR FLEET.

That during the spring of 1908, February, March and April, the government determined to keep on hand a large supply of materials to build up its stock in order to be prepared to fit up the Pacific fleet which generally arrived in the spring. Among the items required for this fleet, zinc was very essential. (Trans., p. 961.) The witness then testified, (Trans., pp. 1006-1015), to instances in which the government had paid, under the authority of the secretary of the Navy Yard, or his assistant, as high as 14c or 15c a pound for zinc. That the witness received word about the middle of March that the Atlantic battle squadron would come to Seattle very shortly, and thereupon requisitions for a large

quantity of supplies were prepared. (Trans., p. 1033.) In connection therewith requisition No. 438 for 50,000 pounds of zinc was prepared. The requisitions were all for very short deliveries. (Trans., p. 1050.) At the same time this requisition No. 438 was prepared, other requisitions were prepared, calling for a larger quantity of supplies than had been customary, and no complaint has been made concerning these other requisitions. (Trans., p. 1054.) That in preparing this requisition No. 438, the motives which prompted the witness toward the same were the same which actuated him in preparing other requisitions, about which the government has made no complaint.

DENIES STATEMENTS OF KETTLEWELL.

That the statement of Kettlewell that the witness stated to the said Kettlewell that he was about to prepare a large requisition, and that he should watch for it, was absolutely false; that the witness never entered into a conspiracy with any one to defraud the United States Government in any manner whatsoever. The requisition in question was authorized by the Pay Master General of the United States Navy at 12½c (Trans., p. 1064), and that the witness had no idea to whom the contract had been let, nor had he had any conversations with Kettlewell or Goldberg concerning the same. (Trans., p. 1071.) Requisition No. 438 showed on its face, as did all other requisitions issued at the time, that it was issued for the purpose of supplying the At-

lantic Squadron which was about to arrive at the yard within a month. (Trans., p. 1092.)

The witness further testified that requisitions for zinc had come in for as high as 10,000 pounds for one ship, and that the amounts requisitioned varied from 1000 pounds to 10,000 pounds. (Trans., p. 1100.)

C

CLAIMS OF THE PLAINTIFFS IN ERROR.

There is no charge in the indictment, nor was it contended at the trial, that the materials furnished the Government were of an inferior quality; on the contrary, the proofs clearly showed that the materials were of standard quality, and that only reasonable profits were obtained, and that these same materials could not have been purchased elsewhere.

It is our contention:

1.

THE INDICTMENT IN THIS CASE IS VOID, AS IT IS BARRED BY SECTION 1044 OF THE REVISED STATUTES OF THE UNITED STATES.

This section reads:

> "No person shall be prosecuted, tried or punished for any offense not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

THE CONSPIRACY ENDED WITH THE DELIVERY OF THE CHECK TO THE PLAINTIFFS IN ERROR ON MAY 26, 1908, WHICH WAS MORE THAN THREE YEARS PRIOR TO THE FILING OF THE INDICTMENT.

It will certainly be conceded that if the alleged offense of conspiring to defraud the Government was completed on the 26th day of May, 1908, that the case of the prosecution is barred by the section above referred to. There is no conflict in the evidence as to the time of commission of the various acts referred to in the indictment. The testimony both of the Government and of the plaintiffs in error, agrees as to the times of occurrences. The issuing of the requisition for the purchase of the supplies in question; the giving out of information regarding the requisitions; the recommendation of the acceptance of the supplies; the giving of notice to the public that competitive bids would be received; the recommendation of the award to the plaintiffs in error; the acceptance of the supplies; the suggestion and recommendation of the payment of the check in question, and the delivery to the plaintiffs in error of this check,—all occurred long prior to the delivery of the check, which delivery was made on the 26th day of May, 1908. Prior to that date the materials had been delivered, inspected and accepted, and on that date the check was delivered, and the Public Bill for same was receipted. This receipt evidenced the completion of the transaction, and this receipt is dated May the 26th,

1908. There could have been no delivery of the check without this receipt.

THE TESTIMONY SHOWS THAT MAY 26, 1908, AND NOT JUNE 1, 1908, AS ALLEGED IN THE INDICTMENT, WAS THE DATE OF DELIVERY OF THE CHECK.

We call the Court's attention to this testimony concerning the delivery of the check:

"MR. SCHLESINGER.—I want to call your attention, Mr. Kettlewell, to what purports to be a copy of a public bill. Do you recognize that as a true copy?

"A. Yes, sir, I think that is a true copy.

"Q. I will call your attention to an endorsement upon that bill reading—

"MR. ALLEN.—Pardon me, before you read it—

"MR. SCHLESINGER.—Do you wish to see it, Mr. Allen?

"MR. ALLEN.—I would like to.

"MR. SCHLESINGER.—You have the original.

"THE COURT.—Defendants' exhibits?

"MR. SCHLESINGER.—Yes, your Honor.

(Paper referred to marked Defendants' Exhibit "G.")

"Q. Mr. Kettlewell, you knew there was a rule requiring bids to come from legitimate bidders, did you not?

"A. Yes, sir.

"Q. You knew that there was a rule requiring bids to come from persons engaged in trade, did you not?

"A. Yes, sir.

"Q. And you knew all of those matters when you were engaged in these various transactions?

"A. Yes, sir.

"Q. Now, calling your attention to this stamp (showing), will you kindly read that aloud so the jury may hear you?

"MR. ALLEN.—Is that introduced in evidence?

"MR. SCHLESINGER.—Yes, and marked Exhibit "G."

"A. 'United States Navy Pay Office, Seattle, Washington. Paid May 26, 1908. Robert H. Orr.' The rest is blurred.

"Q. And that is marked 'Paid,' is it, on May 26th, 1908? I *will ask you whether* the check *was delivered* together with that paper on that date?

"A. I think *that it must have been,* yes.

"Q. You think it must have been?

THE COURT.—What date was that?

"MR. SCHLESINGER.—*May 26th, 1908.* If it had not been so delivered it would not bear the imprint 'paid,' would it?

"A. No, I think not."

(Trans., pp. 428-429.)

We also call the Court's attention to this testimony regarding the proposal to sell to the government. This proposal was issued April the 11th, 1908, and award was made April 15, 1908:

"Q. This proposal is dated April 11, 1908 Would it be your recollection that was the date of the proposal as you signed it at that time, April 11, 1908?

"A. I think that was about the date.

"Q. You think that was about the date?

"A. The date that was filled in there was the date.

"Q. How long was that before the day of the

award, if the award was made on the 15th, how many days before that did you sign it?

"A. If the award was made on the 15th it would be four days.

"Q. In other words, you signed this proposal about on the 11th, as I understand you?

"A. If that is the date.

"Q. And the award was made on the 15th. Were you present at the award, as a matter of fact, do you remember?

"A. I was not."

(Trans., p. 451.)

"Q. After this conversation when did you next hear about your bid with the United States Government for a lot of zinc?

"A. I don't think I heard anything more until Mr. Goldberg called me up and told me the check was up there for it. That is my next recollection of that transaction.

"Q. Told you the check was up there for you?

"A. That is what I understood, I believe.

"Q. Did you personally get the check, or did Mr. Goldberg get it?

"A. My best recollection is that I got it.

"Q. Calling your attention to that part of Plaintiff's Exhibit No. '5,' that part which purports to be a check dated May 26th, 1908, payable to the order of the Fowler Metal Company, in the sum of $7,417.09. Did you ever see the original of which that is a photographic copy before, Mr. Silverstone (exhibiting same to witness)?

"A. I think I did.

"Q. I will call your attention to the endorsements on the back of that check. What did you do with the check when you got it?

"A. I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check.

"Q. What did he tell you then with reference to it?

"A. He asked me if I would exchange checks with him, give him my personal check for this one. I told him I would if he would endorse it, so he endorsed it over to me, 'Pay to the order of E. Silverstone,' and signed it 'Fowler Metal Company.' I then endorsed my name on it and took it to the bank to make a deposit, because I couldn't have given him my check unless I had this one in the bank. The receiving teller told me they could not accept the check that way, as the Government required some official to sign. So I took it back to Mr. Goldberg, and he endorsed it. I think it is 'Per E. S. Fowler.'" (Trans., pp. 454-455.)

"Q. When the voucher came back from the navy yard what was done then, after it was checked over?

"A. After it was checked over, a check was issued in payment therefor, and a copy of the voucher sent with the check to the dealer. A copy of the voucher was also sent with the daily reports to the Paymaster General." (Trans., pp. 292-293.)

"Q. All right; tell what happened.

"A. The requisition was received—or the approval was received on the 9th of April and the proposals were held until the 11th of April. In the meantime, as soon as the requisition was approved, I telephoned Mr. Goldberg and he came to the office and said, 'I want to get an extra set of those proposals,' he says, 'I have got another party that I want to bid on this.' He says, 'I don't propose to split up the profits with half a dozen people. I want to get another bidder on this.' I says, 'Who will it be?' He says, 'I don't know yet; I will let you know.' I says, 'Whoever it is, don't let them know I know anything about it; have them come up

here and get the proposal in the regular way.' And a gentleman did come into the office and get the proposal. He looked over the bulletin board, where we have a copy of this posted, and he says: 'I represent the Fowler Metal Company and I would like to get a set of proposals to submit a bid on this zinc,' and I says, 'All right,' and I gave him two copies. I didn't know who he was. And I also gave Mr. Goldberg an extra set of proposals." (Trans., pp. 298-299.)

"Q. Now, the first bid is to the Fowler Metal Company?

"A. The Fowler Metal Company.

"Q. And that was put in by Mr. Silverstone sitting here?

"A. Yes, sir.

"Q. The next bid?

"A. That is the same.

"Q. The next bid was to whom?

"A. The Great Western Smelting & Refining Company.

"Q. Signed by whom?

"A. Signed, Great Western Smelting & Refining Company, per Emar Goldberg.

"Q. Emar Goldberg is one of the defendants in this case?

"A. Yes, sir.

"MR. ALLEN.—What is the dates of all these now?

"MR. RIDDELL.—These are all dated what dates, Mr. Kettlewell?

"A. Dated April 11, opening April 13, 1908." (Trans., pp. 300-301.)

The testimony of Mr. J. A. Kettlewell conclusively shows the date of the delivery of this check, and is absolutely substantiated by the testimony of Mr. Emar

Goldberg, and hence all of the testimony in the case shows that the check was delivered not later than the 26th day of May, 1908.

"Q. Now, Mr. Kettlewell, I show you Plaintiff's Exhibit '5' and call your attention to the photographic copies of that first instrument there. Do you know what the instrument is of which this is a photographic copy?

"A. Copy of check issued from the navy pay office in payment for this Fowler Metal Company's zinc.

"Q. When that check was made out, then what happened?

"A. When this check was made out I phoned to Mr. Goldberg and told him that the check was ready, and the check was delivered either to Mr. Goldberg or to Mr. Silverstone, I don't remember which.

"Q. What day was it delivered?

"A. Delivered June first, no DELIVERED—DELIVERED—DELIVERED THE DAY IT WAS DATED, MAY THE 26TH.

"Q. May the 26th?

"A. THE DAY IT WAS DATED.

"Q. You don't remember to which MAN it was delivered?

"A. I couldn't say.

"MR. SCHLESINGER.—YOU MEAN MAY 26, 1908?

"A. 1908, YES SIR.

"Q. When the check was delivered?

"A. Yes, sir, THE DAY THE CHECK WAS MADE, AS I REMEMBER IT WAS DELIVERED.

"SPECIAL COUNSEL MR. RIDDELL.—

AS YOU REMEMBER, THE CHECK WAS DELIVERED THE DAY IT WAS MADE.

"A. As I remember. It may have been delivered the next day, but I THINK IT WAS THE DAY IT WAS DATED. That was the usual procedure and I know we would want to get rid of it as soon as possible." (Trans., pp. 304-307.)

Emar Goldberg, corroborating his testimony, said:

"Q. *What date was it that you received the checks from his hands?*

"A. *On the 26th day of May."*

* * * * * *

"Q. In other words, you received that check upon the 26th day of May, and that check rested in your office until the 31st day of May?

"A. Until the 1st day of June." (Trans., p. 715.)

"MR. SCHLESINGER.—What, if anything, accompanied that check?

"A. What they call a public bill.

"Q. Have you that public bill with reference to this?

"MR. ALLEN.—It is in evidence.

"MR. SCHLESINGER.—What is the number of the exhibit?

"MR. SHIPLEY.—Why, it is here, Mr. Schlesinger.

"MR. SCHLESINGER.—I will ask you whether this so-called public bill accompanied that check?

"A. Yes, sir, this public bill was with the check.

"MR. KERR.—Refer to it as an exhibit number.

"MR. SCHLESINGER.—Yes. This is Defendants' Exhibit Letter 'G.'

"Q. What did you do with this public bill at the time that it was given to you by Kettlewell together with the check?

"A. Put the bill in our files, put this in our files.

"Q. On what date?

"A. ON THE 26TH DAY OF MAY, 1908." (Trans., p. 716.)

The receipt of the check from the officials of the Government was the last act evidencing the existence of any conspiracy. A number of overt acts were committed prior to this time, but the pleader, to avoid the obvious bar of the statute, has not declared upon a single one of these overt acts. The indictment does not set out the doing of any of the things which necessarily must have been done before the delivery of the check.

ALL ACTS SUBSEQUENT TO MAY THE 26TH, 1908, WERE PRIVATE ARRANGEMENTS BETWEEN THE PARTIES TO THE CONSPIRACY, ARRANGEMENTS BY WAY OF SETTLEMENT, AND HAVING NOTHING TO DO WITH THE SUBSTANTIVE OFFENSE.

The charging part of the indictment plainly sets out the conspiracy,—"That they should secure the issuance by the Pay Master of the United States Pay Office at Seattle, Washington, of a check payable to the order of the said Fowler Metal Company, for an amount appearing to be due the said Fowler Metal Company, according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

Then follow mere conclusions of law, and then overt acts and the overt acts all relate to the delivery of the check subsequent to May the 26th, 1908. The pleader was careful to place the time as of the first day of June, 1908, to avoid the bar of the statute.

Let us consider the position of the parties upon the day after the 26th day of May, 1908. Was there any intention to defraud present in the minds of any or all of them? They have now been paid by the United States Government in the manner which was customary for the government to pay its creditors, viz: by check on a United States depositary, and it is the charge in the indictment that they conspired to obtain this very check. They had possession of a negotiable government instrument,—an instrument used by hundreds of thousands of people every day, and accepted by any one, any where, at its face value, without question. They had succeeded in selling their wares to the Government; they had succeeded in having their bid accepted; they had succeeded in securing a recommendation for the payment of their claim, and they had succeeded in securing in payment the check of the government, which was the object of the conspiracy. They had completed what they had set out to complete, according to the allegations of the indictment.

They might have kept the check one year or twenty, but the conspiracy would have still been completed. The depositing or non-depositing of the check, the division of the spoils, have nothing to do with the comple-

tion of the crime of conspiracy. It has never been argued that the success of a conspiracy is essential to indictment. This check was in form as current as if it had been bank notes or United States currency. Under the law and authorities, this government check is equivalent to currency.

They were in the possession of the equivalent of actual money. Having secured possession of the check, all of the relations and dealings between the government and the defendants with respect to the alleged crime set out, were at an end. Merely depositing the check to their credit in the bank did not add to the crime, nor take from it. The mere placing of this check to their credit had no relation to the conspiracy upon which they were indicted. It did not involve the Navy Yard in the matter, or the awarding of the contract. It merely created a new relation of debtor and creditor between the depositor and the banker. After May the 26th, 1908, the conspirators had ceased to conspire; they were then merely reaping the results of their crime.

The evidence which we have quoted upon this point distinctly shows that they were no longer conspiring, and defendants' "Exhibit G," which is the public bill stamped "Paid, May 26th, 1908," is conclusive, there then being an agreement of immediate release.

Notwithstanding the fact that the testimony of the government shows indisputably that this check was delivered May 26th, 1908, the government, to avoid the

obvious bar of the statute, charged in the indictment, as pointed out, that it was delivered "on or about the 1st day of June, 1908," just one day before the presentment and filing of the indictment.

The evidence in the case just quoted shows conclusively that this check was received as absolute payment. It was a government obligation, given for materials already received by the government. It was not given as conditional payment, but in full discharge of the debt. And this is not like an ordinary check, upon which doubt might be case as to the financial standing of the drawer and his ability to pay. To doubt this check would be to doubt a government bond, or money of the government. It must be borne in mind that we are dealing with a government check, for government purposes, on a government depositary. Does any one hesitate to accept treasury notes of the United States government, or silver certificates, or government bank notes? A government check is in the same category. The evidence absolutely shows that the check was given, received and intended as absolute payment of the claims of the plaintiffs in error.

THE STATUTE OF LIMITATIONS IN CIVIL CASES HAS BEEN HELD TO RUN FROM THE DATE OF PAYMENT BY CHECK, AND NOT FROM THE DATE ON WHICH THE CHECK IS EXCHANGED FOR ANOTHER, OR DEPOSITED OR EXCHANGED FOR OTHER MONEY.

The construction of the statute in a civil proceeding

is authority for a like construction in a criminal proceeding.

U. S. v. *Kittell,* 211 U. S. 370;

U. S. v. *McAndrews,* 149 Fed. 830.

As has been pointed out, the success or failure of the conspiracy cuts absolutely no figure. The completion of the substantive offense is absolutely immaterial. But as to that, the substantive offense was certainly completed on May the 26th, 1908, for upon this date the plaintiffs in error received the check in question. And, again, the indictment clearly charges that the purpose in view was to procure the issuance and delivery of this check.

All of the authorities agree that in civil cases the statute begins to run on the date of the receipt of the check, and not on the date it is finally cashed. In truth and in fact it does not appear that the check was ever cashed at all. The transaction did not call for cashing over the counter. It was deposited to the credit of Silverstone, one of the alleged co-conspirators, and he issued his own check in lieu thereof to G. W. S. & R. Co. See note to 15 Am. & Eng. Am. Cases, 332. to 15 Am. & Eng. Am. Cases, 332.

In *Ilsey* v. *Jewett,* (1840), 2 Metc. (Mass.) 168-173, the Court, speaking through Chief Justice Shaw, said:

> "It has often been held in this Commonwealth, and is now considered as a settled rule of law that giving a party's own promissory negotiable note, for a simple contract debt, is *prima facie* evidence of

payment, and may be so held, unless rebutted by clear proof that it was not so intended. *Thacher* v. *Dinsmore,* 5 Mass. 299; *Maneely* v. *McGee,* 6 Mass. 143; *Wood* v. *Bodwell,* 12 Pick 268."

* * * * * * *

"Being in legal effect, not merely an acknowledgment or promise, *but a payment,* no writing is necessary. The effect is the same as if the amount had been paid in bank notes or coin. This is an answer to the objection that the note ought not to operate as a promise in writing to pay more than it promises to pay and that to hold it to be a promise to pay the balance would be to pervert its terms, and make it speak a language that it does not speak. But the answer is that it is not considered as a promise in writing to pay the whole debt; but is of itself, de facto *a payment of part.*"

In the case of *La Fayette County Monument Corporation* v. *Magoon,* 3 L. R. A. 765, Judge Lyon said:

"We cannot doubt that the transactions between the parties of April 6, 1887, evidenced by the communication of the defendant to the plaintiff corporation, and the receipt which was approved and accepted by the defendant (both of which will be found in the foregoing statement of facts) show conclusively that the check in suit was given and received as a payment of the defendant's subscription to the monument fund. The language of the defendant to the plaintiff in such communication is: 'I, Henry S. Magoon . . . hereby subscribe and hand to the treasurer of said corporation $1,000 in money to be used,' etc., and that of the receipt is: 'Received of Henry S. Magoon the sum of $1,000, according to the foregoing letter,' etc. It is there-

fore a receipt for $1,000 in money. We cannot conceive how the parties could have expressed in stronger terms their intention that the check was given and received as money, and hence that it paid the defendant's subscription as effectually as though the payment had actually been made in cash. Had the plaintiff brought an action upon the subscription instead of the check, we think a defense that the subscription had been paid would be proved by the transactions of April 6, 1887. Possibly this view of the case removes from it the question whether there was a valid consideration for the subscription, but it is deemed proper to determine that question."

In *Marreco* v. *Richardson,* 15 Am. & Eng. Ann. Cases, 329, the Court of Appeals of England, in passing upon this precise question, speaking through Lord Justice Farwell, said:

"I agree that the decision appealed from should be affirmed. The only important question in the case is the date of the part payment, for there is no written promise to pay the balance. There is no doubt the check was given in part payment of the debt, and if it was so given in due time, that is, within six years of the commencement of this action, the case is taken out of the statute; if not, the debt is statute barred.

"In *Pearce* v. *Davis,* (1834), 1 M. & Rob. 365, Patteson, J., says, in very terse and clear language: 'The production of this check is not evidence of any loan; if it be evidence of anything, it is rather evidence of payment. It operates as payment, until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought.' In other words, if a man pays his tailor's bill by check and the check is accepted as payment, the tailor cannot

sue for his account until the check has been presented and dishonored. And if the receiver of a check does not present it for payment within a reasonable time, and the bank upon which the check is drawn fails, the loss will fall upon the holder; and the only effect that can be given to the agreement that the check should not be presented until June 20 is that if the bank had failed the loss might in that case have fallen on the drawer. But none the less the payment is made at the time when the check is given, and I infer from the judgment of Patteson, J., that the giving of a check would support a plea of payment. In the more recent case of *Hadley* v. *Hadley,* (1898), 2 Ch. 680, Byrne, J., held that a check for a bill of exchange given in respect of a pre-existing debt operated as a conditional payment thereof, and on the condition being performed by actual payment, the payment related back to the time when the check or bill was given. That is only expressing the same principle in another form, and I should myself prefer to say that *the giving of a check for a debt is payment conditional on the check being met,* that is, *subject to a condition subsequent; and if the check is met it is an actual payment ab initio and not a conditional one.* There was only one act of payment here, that *on May 10, and that was out of time* for the purpose of avoiding the operation of the statute."

* * * * * * *

"The only conclusion I can draw from the facts is that on June 20 the defendant fulfilled his obligation to pay the check; I canot infer from that any promise made by him on that day to pay the remainder of his debt. Suppose that on May 10 the defendant had given a promissory note payable three months after date; payment could clearly not be en-

forced for three months. That would be a stronger case for the plaintiffs than the present one; there can be no doubt that payment of the note at the due date would be nothing more than a discharge of the obligation entered into when the note was actually made. There would not be in that case, and there is not in the present case, any fresh act or conduct from which we could infer that the debtor was promising to pay the remainder of the debt, or was doing anything more than carrying out his obligation of honoring the negotiable instrument which he had given. THE RESULT IS THAT THERE IS ONLY ONE ACT AND ONE MOMENT OF TIME WHICH CAN BE LOOKED AT HERE IN DETERMINING WHETHER THERE HAS BEEN A RENEWAL OR A PROLONGATION OF THE PERIOD WITHIN WHICH THIS ACTION COULD BE BROUGHT, AND THAT IS THE GIVING OF THE CHECK ON MAY 10; BUT THAT WAS MORE THAN SIX YEARS BEFORE THE COMMENCEMENT OF THIS ACTION, AND IT IS THEREFORE STATUTE BARRED."

(NOTE B.) "The second case is *Turney* v. *Dodwell,* 3 El. & Bl. 136, 77 E. C. L. 136, a very strong case in favor of the defendant. I need not cite the whole case, but the following passage from the judgment of Lord Campbell, C. J., (3 El. & Bl. 142, 77 E. C. L. 142) is very apposite: 'We think that where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the statute of limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill.'"

In the case of *Rogers* v. *Durant,* 140 U. S. 301, 35 L. Ed. 482, (1891), Mr. Chief Justice Fuller said:

"Daniel comprehensively defines a check to be 'a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.' 2 *Dan. Neg. Inst.,* Sec. 1566. And in a note to that section he gives these definitions and descriptions of checks from the text-writers: 'A check on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand.' *Byles on Bills,* (Sharswood's ed.) 84. 'A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument.' *Story on Prom. Notes,* Sec. 487. 'A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money.' 2 *Pars. Notes and Bills,* 57. 'A check drawn on a bank is a bill of exchange payable on demand.' *Edwards on Bills,* 396."

* * * * * * *

"It has also been decided that an instrument is not less a check because it orders payment 'on account of A, (*Ridgely Nat. Bank* v. *Patton,* 109 Ill. 479); and that its character as a check is not changed by the fact that it is payable in another State than the one in which it is drawn. *National Bank of America* v. *Indiana Bkg. Co.,* 114 Ill. 483, 1 West. Rep. 354; *Union Nat. Bank* v. *Oceana County Bank,* 80 Ill. 212. And the settled rule in that jurisdiction is that, where a depositor draws his check on a banker who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to

the payee, who can sue for and recover the amount from the banker; and that a transfer of the check carries with it the title to the sum named in the check to each successive holder. *Brown* v. *Leckie,* 43 Ill. 497; *Munn* v. *Burch,* 25 Ill. 35, and cases *supra.*

* * * * * * *

"The fourth plea was inaccurate in its reference to a former Statute of Limitations, approved February 10, 1849, but that is immaterial; and, stripped of surplusage, it averred that the cause of action set forth in each of the twenty special counts as well as the common counts did not accrue within five years next before the bringing of the suit."

And in the recent case of *Norton* v. *United States,* 205 Fed. 593, this precise question was decided by the Circuit Court of Appeals, for the Eighth Circuit, and the court said:

"It is said that the first count of indictment 587 is duplicitous in that it charges that the misapplication was by means of moneys and credits being withdrawn in the form of cash exchange in the sum and value of $9000, by means of a check drawn by the Bartlesville State Bank upon the American National Bank in the sum of $9000, the State Bank having no credit with the American National Bank, and giving therefor four drafts payable to the customers of Bartlesville State Bank, one for $3000 and three for $2000 each. It is argued that this constituted not a misapplication, but a mere matter of bookkeeping in relation to giving credits. It is true that the mere giving of a wrong credit upon the books of a bank would not of itself constitute misappropriation; but

in this case, it was not a matter of mere credit, BUT THE BANK ISSUED TO THIRD PARTIES ITS DRAFTS OR CHECKS WHICH WERE EQUIVALENT TO MONEY AND THE MISAPPROPRIATION TOOK PLACE WHEN SUCH DRAFTS WERE ISSUED IN PAYMENT OF THE $9000 DRAFT DRAWN BY THE BARTLESVILLE STATE BANK AND NOT WHEN THE FOUR DRAFTS WERE ULTIMATELY PAID BY THE AMERICAN NATIONAL BANK. The misapplication charged in the indictment is the payment of the draft for $9000 drawn by the Bartlesville State Bank by means of the four drafts of the American National Bank. Hence this count of the indictment is not duplicitous."

And so in the case at bar the issuance of the check to the defendants, and their receipt thereof, was the substantive offense of defrauding the government and prosecution for such offense, would have been barred on May 26, 1911, three years from the date of the delivery thereof. And surely a conspiracy cannot follow the completion of the basic offense.

The actual loss of the money to the government is not necessary to assist the indictment under section 5440 of the Revised Statutes. See *McGregor* v. *United States,* 134 Fed. 187.

The statute of limitations in civil cases is tolled from the date of payment by check, and not from the time it is cashed, or deposited or exchanged for another. Surely the same rule must be applied to criminal cases where the liberty of the citizen is involved.

In *Bell* v. *Morrison, et al.,* 26, U. S. 351, Mr. Justice Story said:

"It has often been matter of regret, in modern times that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may arise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; at any admission of the existence of an unsettled account, without any specifications of amount or bal-

ance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence aliunde, to establish any debt, however large, and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute, must be, in a great measure, defective; and the statute virtually repealed."

In the case of *Palmer* v. *Priest,* 18 Fed. Cas. 1014, Judge Sprague, speaking for the court, said:

"Where, then, it appears to the court, that the note of a sole debtor, or of one of several debtors, or of a third person, was by mutual agreement taken in discharge or payment of a pre-existing debt, the original claim is thereby extinguished, and the creditor can rely only on the note.

"The receipt, in this case, is evidence that such was the agreement between these parties. It is not necessarily conclusive. It may be controlled, either by direct evidence or by circumstances. But here there is neither direct evidence, nor any circumstance in any degree impairing the force of the receipt, and the libelants have therein declared that the note was received in payment. This is more direct and positive than in *The Chusan* (Case No. 2,717, where the receipt was of a note 'for the above amount,' or in *Butts* v. *Dean,* 2 Metc. (Mass.) 77, where the receipt was, 'for balance of account to date.' Libel dismissed."

In *Commonwealth* v. *Wood,* 8 N. E. 432, Chief Justice Morton said:

"The defendant asked the court to rule that, upon the evidence, 'the offense was not complete in this commonwealth, and, even if complete, defendant

could not be convicted in this county,' which ruling the court refused. It appears by the bill of exceptions that 'the government introduced evidence tending to prove the representations alleged at Berlin; that they were false and known to be so by the defendant; and also that the purpose of the defendant in making them was as alleged in the indictment; and that, in consequence thereof, Peters was induced to send a cashier's draft for the amount named, of which a copy is inserted in the indictment, to the defendant, at New York, being directed so to do by a note written by defendant, and left at Peters' place of business in Boston.' Although the defendant received the money on the cashier's draft in New York or in Minneapolis, *it cannot be doubted that the offense charged in the indictment was accomplished and completed at Berlin when Peters, at the request of the defendant, sent him the draft, whether he sent it by the hand of an agent of the defendant, or deposited it in the mail.* The exceptions do not show how he sent it; but, if he sent it by a carrier or other agent of the defendant, the delivery to the agent was a delivery to the defendant. *Com.* v. *Taylor,* 105 Mass. 172. So, if he sent it by mail, when he deposited it in the post-office it passed out of his control into the control of the defendant, and the postmaster was the agent of the defendant to forward the letter to him. *Regina* v. *Jones,* 1 Eng. Law. & Eq. 533; S. C. 4 Cox, Crim. Cas. 198."

In *State* v. *Briggs,* 7 L. R. A. (N. S.) 278, Chief Justice Johnston, of the Supreme Court of Kansas, speaking for the court, said:

"It is said that the draft was obtained in Crawford County, where the prosecution was had, while the money was obtained upon it in Labette

County. Only one offense was charged, and it arose out of the single transaction of obtaining the draft for $60 by false pretenses. The averment that he had collected the money on the draft did not state an additional offense, nor invalidate the information. *State* v. *Pryor,* 53 Kan. 657, 37 Pac. 169; *State* v. *McDonald,* 59 Kan. 241, 52 Pac. 453; *State* v. *Meade,* 56 Kan. 690, 44 Pac. 619. Nor can there be a valid objection to the jurisdiction of the court. The false representations and pretenses were made in Crawford County, and the draft was mailed by Mattox to Briggs in the same county. It was received in Labette County, it is true; but the general rule is that the venue is in the county where the property is obtained by the false pretense. The draft was obtained by the false pretense. The draft was obtained from Mattox when he surrendered possession of it by placing it in the postoffice, addressed to the appellant. The Postoffice Department is deemed to be the agent of the appellant in the same way that a common carrier would have been his agent if the draft had been given to it for delivery to the appellant. *Re Stephenson,* 67 Kan. 556, 73 Pac. 62; *Com.* v. *Wood,* 142 Mass, 459, 462, 8 N. E. 432; *Reg.* v. *Jones,* 1 Den. C. C. 551; *Reg.* v. *Leech,* Dears. C. C. 642; 1 McClain, Crim. Law, sec. 696."

In the case of *Ball* v. *Shepard,* 95 N. E. Rep. 719, New York Court of Appeals, decided in 1911, it was said:

"'The law, wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it

in due course of business and in good faith upon a valid consideration.' 79 N. Y. 187 (35 Am. Rep. 511). Perhaps the simplest illustration of this principle is to be found in *Justh* v. *Nat. Bank of Commonwealth, supra,* where the plaintiffs' certified checks which had been obtained by fraud, were deposited with the defendant bank by the person committing the fraud, in the ordinary course of business, and were paid by the bank on presentation. In that case the court suggested that the plaintiffs were cheated, not by the defendant, but by the fraud of the parties to whom they gave their certified checks, and that the loss occasioned by that fraud could not be transferred to the defendant bank, which was an entirely innocent party. The checks there used were referred to by the court as money which came into the hands of the defendant 'in the regular course of business, in a form as current as if it had been bank notes or United States currency,' and the court concluded that, if in such a case, it could be followed because the party who paid it procured it fraudulently, 'the transaction of business must stop, for no inquiry and no precaution could guard the receiver from responsibility."

AFTER MAY 26, 1908, THE CONSPIRACY CEASED TO BE A CONTINUING OFFENSE, AND BECAME A COMPLETED CONSPIRACY WITH A CONTINUING RESULT.

THE OBJECT OF THE CONSPIRACY, THE RECEIPT OF THE CHECK, WAS EFFECTED ON MAY 26, 1908.

In *Lonabaugh* v. *United States,* 179 Fed. 476, the defendants were convicted of a conspiracy to defraud the United States of the possession and title of certain of its public lands by means of fraudulent entries under the

Public Land Laws of the United States. The conspiracy consisted of the filing of false entries, after which patents were executed and recorded in the office of the General Land Office of Washington. Thereafter the conspirators obtained to themselves an actual physical delivery of these patents, and caused them to be recorded at the county clerk's office where the land was situated, and the Court of Appeals, speaking through Mr. Justice Van Devanter, then Circuit Judge sitting on the Circuit Court of Appeals for the Eighth Circuit, said:

> "Briefly stated the case made by the evidence, when interpreted most favorably for the government, was as follows: The defendants entered into the conspiracy on or before June 13, 1903. The fraud was to be effected by means of entries which were to be apparently regular, but actually fraudulent, in that they were to be secured by submitting to the local land office proofs falsely stating that the entrymen severally were making the entries solely for their own use and benefit, when in truth they were making them for the use and benefit of a corporation, and were obligated to convey the lands to it when the entries were secured; and the purpose in so falsifying the proofs was to induce the officers of the Land Department to allow the entries and to pass them to patent, neither of which lawfully could be done of the proofs disclosed the true facts. The entries actually were secured by the submission of false proofs as was contemplated; the entrymen, with a single exception, then executed and delivered to the corporation warranty deeds for the lands entered by them, and the remaining entryman then likewise conveyed the lands entered by him to an in-

dividual grantee designated by the defendants. Later the officers of the Land Department at Washington, acting upon the false proofs submitted when the entries were secured, issued to the entrymen patents for the lands (by which it is meant that the patents were duly signed, sealed, countersigned, and recorded in the office of the recorder of the General Land Office at Washington), and STILL LATER THE DEFENDANTS, OR SOME of them, sought and OBTAINED A PHYSICAL DELIVERY OF THE PATENTS, AND THEN CAUSED THEM AND THE DEEDS TO THE CORPORATION TO BE RECORDED IN THE COUNTY CLERK'S OFFICE IN THE COUNTY WHERE THE LANDS ARE SITUATE. And after the issuance of the patents the defendants or some of them also caused the title to the land which had been conveyed to an individual grantee, as before stated, to be passed to the corporation. But the dates of the several acts here recited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents by the officers of the Land Department at Washington or some of the acts SUBSEQUENTLY DONE BY ONE OR MORE OF THE DEFENDANTS CAN BE REGARDED AS SUCH AN ACT."

* * * * * *

"While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (*Hyde* v. *Shine,* 199 U. S., 62, 76, 25 Sup. Ct. 760, 50 L. ed. 90); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there

are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz* v. *United States,* 24 App. D. C. 337, 387; s. c. 196 U. S. 640, 25 Sup. Ct. 796, 49 L. Ed. 631; *Ware* v. *United States,* 84 C. C. A. 503, 154 Fed. 577, 12 L. R. A. (N. S.) 1053; s. c. 207 U. S. 588, 28 Sup. Ct. 255, 52 L. Ed. 353; *Jones* v. *United States,* 89 C. C. A. 303, 162 Fed. 417; s. c. 212 U. S. 576, 29 Sup. Ct. 685, 53 L. Ed. 657."

* * * * * *

"The subsequent acts are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy, that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? To this there can be but one answer, which is that given in *United States* v. *Schurz,* 102 U. S. 378, 26 L. Ed. 167. In that case the Secretary of the Interior, upon becoming satisfied that the grantee named in an undelivered patent was not entitled to the land purporting to be conveyed thereby, canceled the patent, but it was held that the title had

passed to the grantee, and was not recalled by what was done, the court saying:

"'The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.

"'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. . . .

"'In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the lands in controversy, is not effectual for that purpose for want of delivery. That though signed, sealed, countersigned and recorded, and then sent to the register of the land office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee.

* * * * * *

"'We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the land office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument. * * *

" 'The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partially wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

" 'From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

" 'It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title. * * *

" 'The acts of Congress provide for the record of all patents for land in an office, and in books, kept for that purpose. An officer, called the "recorder," is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally prescribed act which completes what Blackstone called "title by record"; and, when this is done, the grantee is invested with that title.' "

"Other decisions to the same effect are *Bicknell* v. *Comstock,* 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 176, 13 Sup. Ct. 271, 37 L. Ed. 123; *McCormick* v. *Aultman,* 169 U. S. 606, 608, 18 Sup. Ct. 443, 42 L. Ed. 875.

"And there is no distinction in this respect between patents which are issued upon *bona fide* entries and those which are issued upon fraudulent entries is illustrated in *Colorado Coal Co.* v. *United States,* 123 U. S. 307, 313, 8 Sup. Ct. 131, 31 L. Ed. 182, where it was said:

> "'It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it was not such a fraud as prevents the passing of the legal title by the patents.'

"Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective. And, recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was effected when the title passed from the United States, and, therefore, that what was done thereafter was not done to effect that object.

"But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. *Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute.* Section 5440 does not interdict all con-

spiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only when one or more of the conspirators do some 'act *to effect the object* of the conspiracy.' It is not enough that the conspiracy be directed to the attainment *of some unlawful object,* or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. *Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction;* and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See *United States* v. *Keitel,* 211 U. S. 370, 391, 29 Sup. Ct. 123, 53 L. Ed. 230.

"It follows from what we have said that the case made by the evidence was one that was barred by the statute of limitation and that the request for a directed verdict of acquittal should have been granted."

The Lonabaugh case has been followed by the United States Supreme Court in both the Hyde and *Elliott* v. *Brown* cases. And is there any distinction between the case at bar and the Lonabaugh case? According to the allegations of the indictment, the plaintiffs in error

sought to defraud the government of money. In the Lonabaugh case, the defendants sought to defraud the government of property.

In *Brown* v. *Elliott,* 225 U. S. 1140, Mr. Justice McKenna, in considering the Lonabaugh case, said:

> "In *Lonabaugh* v. *United States,* 103 C. C. A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: 'While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U. S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete. (*Hyde* v. *Shine,* 199 U. S. 62, 76, 50 L. Ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy, there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz* v. *United States,* 24 App. D. C. 337, 387, s. c. 196 U. S. 640, 49 L. Ed. 631, 25 Sup. Ct. Rep. 796; *Ware* v. *United States,* 12 L. R. A. (N. S.) 1053, 84 C. C. A. 503; 154 Fed. 577, 12 Ann. Cas. 233, s. c. 207 U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *Jones* v. *United States,* 89 C. C. A. 303, 162 Fed. 417; s. c. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685.'"

It was expressly held in the Lonabaugh case that the

procurement of the physical delivery of the patents, and causing them and the deeds to the corporation to be recorded in the county clerk's office in the county where the lands were situated, was not an overt act. In the light of this decision, how can it be held that any acts beyond the mere delivery of the check can be considered as overt acts? The procurement of another check, or merely exchanging the check for money, or another check or a mere depositing of the check as here was a mere result, and not a part and parcel of the conspiracy upon which the plaintiffs in error were indicted. And this decision distinctly holds that some of the acts "subsequently done by one or more of the defendants cannot be regarded as overt acts."

Le us assume that part of this money is today in existence. Would the mere passing of a part of it from one defendant to another be regarded as an overt act? Let us suppose that $7000 in gold coin were paid out for this government obligation, to obtain which the conspiracy was formed. And let us suppose that the same had been placed in a safety deposit box and was doled out from time to time by one co-conspirator to another, this process consuming a number of years. Could it be argued that whenever any part of it was paid out, that that constituted an overt act under the indictment?

THE DISTINCTION BETWEEN A "CONTINUING OFFENSE" AND A "COMPLETED OFFENSE WITH A CONTINUING RESULT" IS WELL ILLUSTRATED BY THE CASES HEREIN CITED AND QUOTED FROM.

This alleged conspiracy is not a continuous crime. It was not to acquire lands without regard to location or time; it was a single conspiracy, having for its object a single purpose. It related to a single transaction,—the sale of a specific quantity of goods, to the government, for a specified price. We have here a conspiracy confined to a single undertaking or purpose, not a continuous conspiracy, such as was declared in *Hyde* v. *United States,* but a conspiracy having for its object and purpose the acquirement of the check in question. And even if it were a continuing conspiracy, the last overt act was the delivery of the check. This precise question came before the United States Supreme Court in the case of *United States* v. *Irvine,* 98 U. S. 451, and this case clearly answers the contention of the government that the subsequent acts of one of the defendants with respect to the depositing to the credit of some one of the check and the division of the proceeds may be construed as an overt act.

In this case the defendant Clark Irvine was charged in the indictment with having on the 24th day of December, 1870, as the agent and attorney of Mrs. Berkely, wrongfully withholding from her the amount of her pension, to-wit: the sum of Five Hundred Twenty-five ($525.00) Dollars, and continually withholding it until

the time of the finding of the indictment in September, 1875. Mr. Justice Miller said:

"The defendant pleaded the statute of limitations of two years as a bar to the indictment, and the court, having refused him the benefit of the bar on trial, now certify other questions on that subject, namely: 2. Is the crime a continuous one down to the time of finding the indictment? 3. Does the Statute of Limitations constitute a bar to this prosecution, the indictment having been found September 15, 1875? * * *

"There is in this but one offence. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offence begins to run.

"It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

"He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

"In the case before us, the judges certify that it appeared on the trial that the pensioner demanded her money of defendant on the 24th of December, 1870, and he refused to pay her, and had never paid

her up to the finding of the indictment, Sept. 15, 1875; that he requested the judge to instruct the jury to acquit him, because the offense was barred by the Statute of Limitations, which the court refused to do.

"We think the statute (Rev. Stat. sect. 1044) was a bar; and we say in answer to the second question, that the crime, as shown in this case, was not a continuous one to the time of the indictment; and to the third, that the Statute of Limitations constitutes a bar to this prosecution."

And so in the case at bar, as soon as the bid for these materials was accepted and the award made and the certified public bill issued, and the check issued, the object of the conspiracy, which was to defraud the United States Government, out of exorbitant prices for materials furnished, was consummated and the agreement was completed under section 5440 of the Revised Statutes, and from that time the Statute of Limitations began to run. The mere changing of the check into another form of Government obligation or currency or gold coin, in order to more conveniently divide the spoils, had no relation to the conspiracy, or the charge of the Government against the defendants. These acts were mere results of a conspiracy to defraud —a successful conspiracy, if you will; for surely this conspiracy has succeeded the very moment the Government made its award, and surely when the Government issued its check, or Government obligation.

The Government was defrauded on the 26th day of May, when the check was delivered, and it passed out

of the hands of Government officials into the hands of the defendants.

In the case of *Ex Parte Black,* 147 Fed. 841, the prisoner was charged with a conspiracy to defraud the United States out of its title to certain of its public lands, which were subject to entry under the Stone and Timber Act. The indictment charged "that from the 1st day of September, 1902, and thence down to and inclusive of the 20th day of June, 1903, the defendants did, knowingly and unlawfully, plot, combine, confederate and agree together with each other and between and amongst themselves, to defraud the United States of America of the possession and use of large tracts of public lands, which were then owned by the Government, in the district of the State of Oregon, and said conspiracy was to be carried out by promising and agreeing to pay large sums of money to sundry and divers persons, who were thereby induced, caused, procured and persuaded to make false, fictitious and illegal entries upon the aforesaid lands of the United States. District Judge Quarles said at page 839:

> "This indictment has industriously obscured the distinction between section 5440 and the common law. It has ignored all the overt acts incident to the fraudulent entry of these lands, and has seized upon an act which relates back to the conspiracy as and for the only overt act. The payment of the several entrymen must be distinguished from an open act in furtherance of the common purpose, because it is connected therewith only through the initial agree-

ment; otherwise it has no relevance to the alleged crime. The stone and timber act under which these entries were made, itself prescribes the several steps which must be taken to effect the object of this conspiracy. FOR SOME REASON WHICH MAY APPEAR LATER ON, ALL THESE HAVE BEEN IGNORED BY THE PLEADER, AND AN INGENIOUS EFFORT HAS BEEN MADE TO SUBSTITUTE AN EQUIVOCAL ACT WHICH BELONGS TO THE FORMATIVE STAGE OF THE CONSPIRACY. TO GIVE EFFECT TO THE STATUTE, AND TO ENFORCE THE WISE AND GRACIOUS POLICY OF CONGRESS, WHICH RECOGNIZES AN INTERVAL KNOWN AS THE LOCUS PENITENTIAE, BETWEEN THE CONSPIRACY AND THE OVERT ACT, WE ARE CONSTRAINED TO HOLD THAT THE INDICTMENT IS IN THIS REGARD RADICALLY DEFECTIVE.

"Second. The undisputed evidence shows that before the 3d day of April, 1903, the date of the earliest alleged overt act, the conspiracy laid in the indictment had been consummated. There is a strange confusion in the averments of the indictment as to dates and the sequence of events, whereby, upon the face of the indictment, it would appear that by the payment of $200 to John B. Million, one of the entrymen, on the 4th day of April, 1903, he was induced and persuaded to make certain false and fraudulent entries which were 'then and there made', etc. The witnesses for the government, and the track book of the Land Office, show beyond dispute that each and every of these preliminary entries was made on the 7th and 8th of October, 1902. So that these entrymen must have been 'persuaded and induced' to undertake this scheme before that date. In like manner it is conceded by the government that the final proofs were

made as to each and every of these tracts of land, the consideration thereof paid to the government, final certificates issued, and a conveyance taken from each of the entrymen, on or before the 17th day of March, 1903. THEREBY EVERYTHING WAS ACCOMPLISHED WHICH WAS CONTEMPLATED BY THE CONSPIRACY, AS LAID IN THE INDICTMENT. EVERY STEP HAD BEEN TAKEN AND HAD BEEN RATIFIED AND APPROVED BY THE OFFICERS OF THE LAND OFFICE, AND A TRANSFER SECURED OF THE FRAUDULENT TITLES SO ACQUIRED. THE ONLY OVERT ACTS TO SUPPORT THE INDICTMENT ARE CERTAIN PAYMENTS MADE TO THE ENTRYMEN BETWEEN THE 4TH DAY OF APRIL AND THE 13TH DAY OF JUNE, 1903, TO CARRY OUT THE AGREEMENT MADE IN THE PRECEDING SEPTEMBER WHEN THEY JOINED THE CONSPIRACY.

"An overt act presupposes a pending conspiracy. So that the act of any one done in furtherance of the conspiracy, may bind all of his associates. When a conspiracy has been completely effected, this implied agency disappears. *Logan* v. *United States,* 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown* v. *United States,* 150 U. S. 93, 14 Sup. Ct. 37, 36 L. Ed. 1010. It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished. SUCH AN ANOMALOUS DOCTRINE MIGHT PROLONG A CONSPIRACY, AND WOULD KEEP IT IN ACTIVE OPERATION UNTIL EVERY OBLIGATION INCURRED DURING THE FORMATIVE PERIOD OF THE PLOT HAD

BEEN LIQUIDATED. In *United States* v. *Donau,* 11 Blatchf. 168, Fed. Cas. No. 14,983, the function of an overt act is declared to be 'to show that the unlawful combination became a living, active combination'. I believe no case can be found where the overt act post-dated the consummation of the conspiracy. Where would be the *locus penitentiae* in such a case? So that, whether you consider the subject-matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, has been allowed to lapse.

"Third. It is apparent from the evidence that the cause of action set out in the indictment is barred by the statute of limitations. By section 1044, Rev. St. (U. S. Comp. St. 1901, p. 725), Congress has declared:

> " 'No person shall be prosecuted, tried or punished for any offense . . . unless the indictment is found . . . within three years next after such offense shall have been committed.'

"Judge Bunn, in *United States* v. *McCord* (D. C.), 72 Fed. 159, says:

> " 'I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty.'

"This language seems to fit the case at bar, and to explain some eccentricities of the pleader. When was this offense committed, and when did the three years begin to run? The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the

statute running, because it was an open act on the part of the defendants to effect the purpose of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3d of April, 1906. TO ESCAPE THIS DILEMMA THE PLEADER HAS BEEN DRIVEN TO SKILLFUL FENCING AND ADROIT EXPEDIENTS.

"It is contended on the part of the government that this was a so-called continuing crime. Conceding for the purposes of this argument that a conspiracy may, under certain circumstances, be recognized as a continuing crime; what fact or feature is there here to bring this case within such a classification? Here the CONSPIRACY WAS CONFINED TO A SINGLE UNDERTAKING, limited to particular descriptions of land, and completed within six months. The entrymen were handled like a drilled squad, and transported from place to place, taking the several necessary steps which culminated, on the 17th day of March, 1903. No effort was made to enlarge the original conspiracy to embrace any other lands, *or adapt it to any further or different transaction.* In the *Greene-Gaynor* Case, *United States* v. *Greene* (D. C.), 115 Fed. 349; *Greene* v. *Henkel,* 183 U. S. 251, 22 Sup. Ct. 218, 46 L. Ed. 177, the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts, whereby the government was defrauded; and in 1897 it was revived as to certain new government contracts. There might be some reason for treating that as a continuing offense, which was revived afresh with each new contract. But there is no well-reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first.

In cases of that nature the doctrine of *Commonwealth* v. *Bartilson,* 85 Pa. 482, and *Insurance Company* v. *State,* 75 Miss. 24, 22 South. 99, is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy, and the jury may be warranted from all the evidence in finding the existence of such new offense within that period. This appears to have been the course adopted in *United States* v. *Greene,* (D. C.) 115 Fed. 349. The indictment charged a conspiracy in 1891 and another in 1897, notwithstanding what is said in the opening about a continuing crime. Certain it is that on the 8th day of October, 1902, a definite overt act was performed, and on the 9th day of October, 1902, an indictment, charging the conspiracy might have been found. Certainly the statute began to run at that date. What circumstance has intervened in this case to interrupt it?"

This case was reviewed in *United States* v. *Kissell,* 218 U. S. 601, in which the Court said:

"The argument so far as the premises are true does not suffice to prove that a conspiracy, although it exists, as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that THE MERE CONTINUANCE OF THE RESULT OF A CRIME DOES NOT CONSTITUTE THE CRIME.

* * * * * *

(1179) "Now, of course, it well may be that the object was so far accomplished by this vote that the

conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result.

* * * * * *

(1179) "Apart from technical rules the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon, coming down to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

"The discussion at the bar took a wider range and is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with the naked and highly technical question when once the possibility of continuation is established, and as to that we can not bring ourselves to doubt."

In the case of *United States* v. *Phillips,* 196 Fed. 574, (1912) where a bankrupt was indicted for concealing property from his trustee, the District Court for the Southern District of New York, speaking through Judge Hough, said:

"But even the *Kissel Case,* 218 U. S., at page 607, 31 Sup. Ct. at page 126 (54 L. Ed. 1168), does not

impugn the authority of the *Irvine case,* and admits THAT THE MERE CONTINUANCE OF THE RESULT OF A CRIME DOES NOT CONTINUE THE CRIME. In my judgment there is legal identity between the *Irvine case* and the one at bar; in both there was what amounted to a demand, and the demand was that the withholding or secreting of property should cease and the person lawfully entitled thereto should receive possession thereof. To apply, or seek to apply, the doctrine of the *Kissell case* to this indictment, results in this: The government, by proving that a bankrupt many years ago secreted some articles of property from his trustee, which fact the trustee knew or had good cause to believe, and for which property demand has duly been made, thereby raises the presumption (apparently irrebuttable) that the crime had continued and would continue as long as the criminal lived and did not surrender. This is the situation painted with disapproval in the *Irvine case,* 98 U. S., at page 452 (25 L. Ed. 193), and to look upon the facts otherwise is to overrule and disregard statutes of limitation generally. If Phillips can be successfully prosecuted under this indictment, every living bankrupt who has been suspected of concealing property can at any time be indicted therefor. I do not so read the act."

THE RETENTION OF THE CHECK FROM MAY 26 TO JUNE 2, 1908, COULD NOT AND DID NOT CONTINUE THE CRIME.

Could it be argument in this case that the mere keeping of the check continued the crime? Or the mere exchanging of the check or depositing the check. In exchanging of the check or depositing the check contion was the mere result of the crime? In fact it is

not apparent that any coin was ever obtained. In *United States* v. *Black,* 160 Fed. 431, the Circuit Court of Appeals said:

"Whatever may appear from the indictment as the relations of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as an 'act to effect the object of the conspiracy', nor to procure services to that end, but in SETTLEMENT OR PAYMENT FOR A PRE-EXISTING SERVICE OR OBLIGATION; that such service was necessarily completed and the obligation INCURRED PRIOR TO THE DATE OF THE LAST CERTIFICATE OF PURCHASE MARCH 17, 1903; so that neither fact nor date of the payment so made can serve as an overt act for charging conspiracy under Section 5440, and thus evade the above mentioned limitation. Assuming that such payment may be provable, in support of the charge, it cannot be received by way of direct proof as an act in the execution of a conspiracy, but as circumstantial evidence tending to show, either the fact of conspiracy, or some of the participants therein. The facts that final entries were made and purchases certified are presumptive if not decisive under the terms of the statutory provisions therefor, known as the Stone and Timber Act, that all proceedings or service required to be performed to that end by either and all of the parties named as conspirators or payees, had been entirely performed when these CERTIFICATES OF PURCHASE WERE ISSUED INSOFAR AS CONCERNS THE CONSPIRACY TO DEFRAUD THE UNITED STATES. If the appellees were engaged as alleged, in a fraud-

ulent conspiracy for that object, and procured the services and action of the several entrymen and the commissioner named as payees respectively, EACH HAD THEN COMMITTED AND COMPLETED EVERY ACT, FRAUDULENT OR OTHERWISE, TO ACCOMPLISH THE ENTRIES AND COMPLETE PURCHASES AS DESIGNED, INCLUSIVE AS OF COURSE, OF THE ALLEGED ENGAGEMENT AND SERVICE FOR WHICH THESE SUBSEQUENT PAYMENTS WERE MADE. Therefore, no occasion remains for further action on the part of either of the conspirators or other persons engaged to effect the object; and no opportunity was open to either conspirator for immunity under the *locus penitentiae* provision of section 5440. WHETHER SETTLEMENTS BETWEEN THE CONSPIRATORS OR WITH AGENTS FOR PROFITS OR SERVICES IN THE CONSPIRACY, WERE THEN OR SUBSEQUENTLY MADE, OR WERE REFUSED, ARE FACTS OF NO MATERIALITY FOR THE OPERATION OF EITHER STATUTE —SECTION 5440 OR 1044.

"We are of the opinion, therefore, that any violation of section 5440 was committed and COMPLETED BEFORE THE CERTIFICATES OF PURCHASE WERE ISSUED, AND THAT NO OVERT ACT IS CHARGED WITHIN THE PERIOD LIMITED BY SECTION 1044, HOWEVER THE AVERMENTS OF THE INDICTMENT ARE CONSIDERED."

"The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the FINAL ENTRIES AND CERTIFICATES OF PURCHASE THERE-

UNDER, FOR THE TWOFOLD REASONS, THAT VIOLATION OF THE STATUTE (a) IN NO WISE DEPENDS UPON THE SUCCESS OF THE CONSPIRACY, AND (b) BECAME COMPLETE (AS BEFORE STATED) WHEN THE FINAL STEP WAS TAKEN ON THE PART OF THE CONSPIRATORS. What course has been or may be adopted by the Land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereupon, is plainly immaterial under this indictment. The general doctrine in reference to public lands subject to entry, appears to be settled, that a tract 'ceases to be subject to the disposal of the United States' when it is entered, paid for and so certified by the Land Office, although no patent has been delivered (*Cornelius* v. *Kessel,* 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482, and *United States* v. *Schurtz,* 102 U. S. 378, 396, 26 L. Ed. 167; 9 Rose's Notes U. S. 1091); but the status of entries made as averred in the indictment is neither involved nor proper for comment in this opinion."

And as in the *Black case* the last overt acts were in truth and in fact those which preceded the procurement of the check. To make the depositing of the check or exchanging the check for another check a part of this conspiracy charge would be to extend the terms of the indictment, to add to the indictment matters not charged by the Grand Jury.

Insofar as the case of *Ware* v. *United States,* in 154 Fed. 579, is applicable to the case at bar, it is distinctly in our favor, for the reason that all of the overt acts with which we are now concerned occurred more than three years prior to the filing of the indictment. No

overt act occurred subsequent to May the 26th, 1908. Circuit Judge Sanborn, in that case, lays down this rule, which we invoke here.

> "After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

The *Lonabaugh case,* which was subsequently decided by the Circuit Court of Appeals, clearly recognizes the distinction laid down in the *Ware case.*

In *United States* v. *Black,* 160 Fed. 431, decided subsequently by Circuit Judge Seaman, does not question the rule in the *Ware case,* but merely holds with the contention "that the object of the conspiracy was not completed until a patent was issued and delivered, is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereunder, for the twofold reasons, that violation of the statute (a) in nowise depends upon the success of the conspiracy, and (b) became complete (as before stated) when the final step was taken on the part of the conspirators."

BUT THE REAL OBJECT OF THE CONSPIRACY AS EXPRESSED IN THE INDICTMENT WAS TO SUPPRESS BIDDING AND ENABLE THE PLAINTIFFS IN ERROR TO SECURE THE AWARD, AND THAT OBJECT WAS EFFECTED LONG PRIOR TO THE 26TH DAY OF MAY, 1908.

What was the object of the conspiracy, as set out in the indictment? Was it to cash the check? The indictment does not so state. The real object was to suppress bidding, to enable the defendants to secure the award; and it embraced, as alleged in the indictment, the awarding of the contract for the furnishing of supplies, to the defendants, and the issuance and delivery to them of a check of the Government in payment of such supplies. The overt acts must have even preceded the issuance of that check. It will be borne in mind that this prosecution is not declared upon any substantive offense, but for conspiracy.

The conspiracy in the case at bar was an accomplished one. It did not contemplate the performance of acts through a series of years. It was a conspiracy having for its ultimate object the issuance and delivery of the check. The overt acts towards the accomplishment of this purpose are not set out. The depositing of the check or exchanging it for another check, or taking other money in lieu thereof, was no part of the conspiracy. It is not charged as a part of the conspiracy. It is not charged as one of the ultimate objects of the conspiracy, and the conspiracy must be determined within the four corners of the indictment. The substantive offense indeed was accomplished, at least, on May 26th, 1908, and if the statute had run against the substantive offense, it surely has run against a conspiracy which, under no circumstances, succeeds the substantive offense.

As said in *Hyde* v. *Shine,* 199 U. S. 82, 50 L. Ed. 97:

> "Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of conspiracy to defraud, and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands, and suffered no pecuniary loss. *MacLaren* v. *Cochran,* 44 Minn. 255, 46 N. W. 408. The law punishes the false practices by which the lands were obtained, and the question whether the government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law."

The indictment in this case expressly charges a conspiracy, viz: to obtain the award to the Great Western Smelting & Refining Company of the bids in question.

THE SUBSTANTIVE OFFENSE WAS COMPLETED WITH THE ACQUISITION OF THE CHECK BY THE PLAINTIFFS IN ERROR.

HOW DOES THE GOVERNMENT PAY FOR SUPPLIES FURNISHED THE NAVY YARD?

When is the transaction with the Government finally closed? This question is conclusively answered by the averments of the indictment itself. On the indictment it clearly appears that the chief clerk, who in this case was Kettlewell, was vested with sundry powers and duties, among them being suggesting and giving of notices to the public that competitive proposals and bids would be received by the Paymaster of the United States Pay Office at Seattle, Washington, for the purchase of supplies for the storekeeper; the preparation of and sending out to the public of proposals, containing specifications of the supplies covered by requisition, and suggesting and devising ways and means of receiving bids and proposals; in recommending the award of, and awarding, contracts to successful bidders; IN SUGGESTING THE APPROVAL OR REJECTION OF THE ACCOUNTS RENDERED TO THE PAYMASTER OF THE UNITED STATES

NAVY PAY OFFICE BY SUCH SUCCESSFUL BIDDER, ACCORDING AS SUCH ACCOUNTS SHOULD BE FAIR AND HONEST, OR FALSE AND FRAUDULENT; in suggesting and recommending the payment, or non-payment, of such amounts, so claimed by such successful bidder to be due him for supplies, according as such claims were honest and fair, or false and fraudulent; and in issuing, mailing and delivering to the successful bidder the check of the Paymaster of the United States Pay Office at Seattle, Washington, for and in payment of the claim of such successful bidder for supplies so forwarded to the storekeeper of the Navy Yard at Puget Sound, Washington.

According to the contention of the Government, Kettlewell did suggest and recommend the payment of this account to the Fowler Metal Company for supplies actually furnished, and did cause to be issued and delivered a check of the Paymaster to the successful bidder in payment of such successful bidder's bill. Kettlewell, according to the indictment (see indictment, page 6), should, with fraudulent intent, send out proposals, which should contain the names of no merchants other than the Great Western Smelting and Refining Company, the Fowler Metal Company, and the W. A. Corder Company, except the names of such merchants who were known to said Kettlewell to be unable to furnish the zinc. (See indictment, page 10.) These proposals were sent out, according to the undisputed testimony of the Government, long before May the 26th,

1908. And Kettlewell was, with fraudulent intent, to examine the bids and proposals, to see whether other merchants had bid thereon; and if they had in fact so bid, he was to manipulate, alter and change such bids so that no persons other than the Great Western Smelting and Refining Company, the Fowler Metal Company, and W. A. Corder and Company should have the contract awarded to them. (See indictment, page 11.) And all these things necessarily have to precede the issuance of the check. And Kettlewell was to recommend and secure the approval of the account, as shown by a certified bill to be filed; and should recommend and secure the issuance from the Paymaster of the United States Navy Pay Office of a check payable to the order of said Fowler Metal Company for the amount due said Fowler Metal Company, and should arrange to have the check delivered to said Silverstone or Emar Goldberg. (See indictment, page 12.) And this was all done long before May the 26th, 1908. The Government, in fact, was defrauded before the issuance of the check. It was defrauded, if at all, upon the approval of the account "showing delivery of zinc, rolled sheet boiler plates, and the acceptance of the same at said Navy Yard at Puget Sound." (See page 12, indictment.) It then became liable for the amount thereof. Its liability being known, it issued the check "in payment of the claim of the successful bidder". Thereupon the transaction was absolutely terminated according to the allegations of the indictment.

The pleader in this case fully realized the difficulties under which he was laboring. He fully realized that his case was barred by the Statute of Limitations, for the indictment fixes the delivery of the check as "on or about June the 1st, 1908". This form of pleading has been condemned in a number of Federal cases, and has never met with approval, especially in cases where time is an ingredient of the offense.

This was plainly recognized in *United States* v. *McKinley,* 127 Fed. 168. That case cites the case of *U. S.* v. *Winslow,* 3 Saw. 342, Federal Case No. 16,742, in which it was directly decided that the allegation that a crime was committed "on or about" a certain day does not show but that the action is barred by lapse of time. That is the precise point of contention in the present case. It is our contention that the present indictment was barred by the Statute of Limitations and that the pleader purposely left the time indefinite by using the words "on or about", in order to avoid having the indictment barred by the Statute of Limitations. Judge Bellinger, in the case of *U. S.* v. *McKinley, supra,* recognized this when he said therein:

> "The reason for the rule stated is that the words 'on or about' render the time of the offense so uncertain that it does not appear but that the action is barred by the statute of limitations."

Other cases to the same effect are:

State v. *Land,* 42 Ind. 311;
Dreyer v. *The People,* 176 Ill. 590, 52 N. E. 372;
State v. *Caverly,* 51 N. H. 446.

The Government selected that date in order to bring the case within one day from the filing of the indictment. The undisputed evidence in the case shows, as heretofore pointed out, there being no conflict of any kind or character, that this check was delivered on the day it was issued, viz: May the 26th, 1908. It was delivered to Emar Goldberg, acting both for the Fowler Metal Company (a subsidiary concern of the Great Western Smelting and Refining Company), and the Great Western Smelting and Refining Company. That the Fowler Metal Company was an existing concern and a subsidiary concern of the Great Western Smelting and Refining Company, is undisputed. That the bid was put in to the Government in the name of this concern with the consent of the nominal head of the Fowler Metal Company is likewise undisputed.

Section 3722 of the United States Compiled Statutes, 1901, Volume 2, page 2501, permits bids to be made by subsidiary corporations—and, it is discretionary with the navy department to accept or to reject the bids of a party or corporation who has offered more than one bid. This section does not prohibit the offering of more than one bid by a person or corporation. To quote the pertinent words of section 3,722:

> "Every contract shall require the delivery of a specific quantity, and no bids having nominal or fictitious prices shall be considered. If more than one bid be offered by any one party, by or in the name of his or their clerk, partner, or other person, all such bids may be rejected; and no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he offers to supply. All persons offering bids shall have the right to be present when the bids are opened and inspect the same."

We are concerned here only with the averments of the indictment. The averments are clearly to the effect that Kettlewell should "cause to be issued, mailed and delivered to the successful bidder the check of the Pay Master of the United States Navy Pay Office at Seattle, Washington. FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER FOR SUPPLIES SO FORWARDED TO THE STOREKEEPER at the Navy Yard at Puget Sound, Washington. (p. 6, Indictment.)

The undisputed facts are that long prior to the 26th day of May, 1908, the Fowler Metal Company was the successful bidder for the supplies in question. These supplies were forwarded to the storekeeper of the Navy Yard at Puget Sound, Washington, and, they being the successful bidder, the check in question was issued and delivered to Emar Goldberg for the Fowler Metal Company and the Great Western Smelting and Refining Company, in payment of the claim for the supplies so furnished; and this check was received in payment

of the claim, and receipt given accordingly.

The check would not, and could not, have been delivered without such receipt. Accompanying the check was a Public Bill, (in evidence), and this bill shows that the check was delivered on May 26th, 1908, as testified to by all of the witnesses, including those of the Government, and the bill stamped "paid" accordingly. The testimony showing that the transaction did not oc-

The testimony showing that the transaction occurred on the 26th of May, 1908, and the indictment having been filed five days too late, the Government at the last moment shifted its position by seeking to have it appear that an act done subsequent to the consummation of the conspiracy was an overt act, and should be treated as such. If defendant had been indicted for defrauding the government out of government property, namely, the check, could he have successfully pleaded the non-cashing of the check? Was his crime not complete when he fraudulently obtained it—a negotiable government check, the equivalent of gold coin?

We earnestly submit that the last overt act which effected the real object of the conspiracy, which was the acceptance of the proposal and bid submitted by the conspirators, and the acceptance of the certified bill of the Fowler Metal Company by the Navy Pay Office.

We do not thing that even the delivery of the check was properly pleaded as an overt act. The indictment was filed on May 31st, 1911, and surely an act previous to June 1st, 1908, cannot be pleaded as overt act.

As Justice Van Devanter, in the case of *Lonabaugh* v. *United States,* 179 Fed. 476, said:

> "But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected."

And so it will be contended here,—that the object of the conspiracy was not limited to the prevention of competitive bidding and the sale to the Government of materials at unreasonable prices, and the securing of the issuance of a check in payment thereof, but to the cashing of the check and the division of the spoils amongst the conspirators. We give the same answer as is given in the Lonabaugh case:

> "The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured."

Let us take the facts of the case at bar. Let us assume that we were under indictment for defrauding the Government out of money and it was shown that instead of money we had gotten the check in question. Could we escape? And so in the case at bar, as soon

as the bid was accepted, the award certified, the bill of the Fowler Metal Company ratified and the check issued, the object of the conspiracy, which was to defraud the United States Government, so that the plaintiffs in error should procure from the Government exorbitant prices for certain materials furnished, was consummated, and the crime which was a violation of section 5440 was completed, and from that moment, of necessity, the Statute of Limitations began to run.

In *United States* v. *Kissel,* 218 U. S. 601, the court clearly emphasizes the distinction between a continuing conspiracy and an accomplished one, and a conspiracy in which the result is continuous over a long period of time. The Court said:

> "It also is true of course that the mere continuance of the result of a crime does not constitute the crime."

The application of the *Kissel case* and that of *United States* v. *Phillips, supra,* in which the *Kissel case* is reviewed, is so obvious that only a word is necessary. These cases clearly hold that a continuous conspiracy and a consummated conspiracy with a continuing result are absolutely distinct and different creatures in the eye of the law.

In *United States* v. *Biggs,* 157 Fed. 264, the Court said:

> "Assuming that the indictment does not charge several conspiracies, as above indicated, but that it

was one conspiracy continuous from its formation on August 25, 1899, to the presenting of the indictment, we come to consider the plea of the Statute of Limitations. The first overt act in furtherance of the conspiracy is charged as of date August 25, 1899, and it is insisted by the defendants that, if the indictment charges but the one conspiracy, on the commission of that overt act prosecution could have then been had, and that therefore the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the *Ware case, supra,* every overt act, with 'conscious participation' by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence, and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense. In that case the indictment charged the formation of a conspiracy within the statute, and, if the proof in such a case sustains the charge, it would be no defense for the defendant to show that a like conspiracy had been theretofore formed and overt acts done thereunder prior to the bar. Taking, therefore, the closing part of the indictment as a part of the charge, it appears that the conspiracy charged against the defendants and all of the overt acts charged thereunder, save the last one, were at a time far more than three years before the filing of the indictment. The reasoning of Judge Deady in *United States* v. *Owen* (D. C.) 32 Fed. 534, impresses me as sound. He there said:

> "'The general rule is that the statute begins to run from the commission or consummation of the crime. Wharton, Crim. Pl., Sec. 321. When was this crime committed? The conspiracy was formed on July 1, 1881,

and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished, and the crime committed. On December 27, 1881, more than five years prior to the institution of this prosecution, an indictment might have been found against the defendants for this crime. This being so, the limitation on the right to institution and prosecution therefor began to run at the same time, and became a bar thereto on that day in 1884.'"

"I think this view is also sustained in *United States* v. *Irvine,* 98 U. S. 450, 25 L. ed. 193.

"But, further, the last overt act is of date May 15, 1906, and it is to the effect that the defendants McPhee and McGinnity did unlawfully request and require William Barth (who was the trustee to take title as charged in the indictment) to execute a certain quit-claim deed conveying title to the lands described in the other overt acts to the corporation named in the charging part, as grantee. Now, the language of section 5440 is, 'And one or more of such parties do any act to effect the object of the conspiracy.' It is contended for the Government, and authorities have been cited to that effect, that, if the overt act is charged to have been to effect the object of the conspiracy, it becomes a question for the jury, and not for the court, to say whether such overt act was done to effect the unlawful purpose. But in those cases it does not affirmatively appear from the charge that the overt act could not have had such an effect, while here I think it does appear that this overt act could not by any possibility have been done to effect the object of the conspiracy. Bearing in mind the offense charged, to wit, a conspiracy to defraud the United States, is it not apparent that the mere execution of the deed by Barth to the lands could have no such effect?

I think it is. The evident purpose of the pleader in inserting this overt act in the indictment is an attempt to toll the limitation of the statute."

This case was affirmed on appeal by the United States Supreme Court in *United States* v. *Biggs,* 211 U. S. 507. The precise question of the Statute of Limitations was, however, not involved.

THE LAST OVERT ACT MUST HAVE OCCURRED PRIOR TO THE RECEIPT OF THE CHECK, FOR THE OVERT ACT CANNOT SUCCEED THE COMPLETION OF THE CONTEMPLATED CRIME.

The United States was surely defrauded after it had issued and delivered its check,—the Government obligation. And there can certainly be no overt act after the conspiracy has been consummated. The conspirators may do many things that are results of their conspiracy with the fruits of their crime, but that does not revive the conspiracy. They may make any use of the fruits of their crime that they see fit; that does not keep the Statute of Limitations alive. Mere transfers of the fruits of a conspiracy have no legal relation to the conspiracy itself. As said in one of the cases, "an overt act presupposes a pending conspiracy, so that an act of any one done in furtherance of the conspiracy may bind all of his associates; when a conspiracy has been completely affected, this implied agency necessarily completely disappears." It is a contradiction of terms to speak of an act done to affect the purpose of a

conspiracy after the conspiracy has been completely accomplished. Such an anomalous doctrine might prolong a conspiracy and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. And, indeed, no case can be found in the books where the overt act succeeds the consummation of the conspiracy. The attempt of the pleader in this case to resuscitate a dead cause of action has been attempted in many other cases with failure.

In *United States* v. *Ehrgott,* 182 Fed. 267, the Court said:

> "The defendants are clearly right in maintaining that an overt act cannot succeed the completion of the contemplated crime."

In the case of *United States* v. *Williamson,* 207 U. S. 453, 52 L. Ed. 297, the Court said:

> "As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might

> base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands."

And in the case at bar, over and above our repeated objections and exceptions, the Court permitted testimony long after the consummation of the conspiracy,—indeed, testimony as to acts occurring on the second day of June, 1908. The Williamson case distinctly holds that "it makes no difference how fraudulent the acts of the parties were, they were not admissible to show motive."

The Government is driven into a singular position. It necessarily must admit that prosecution for the obtaining of the check was barred on the 26th day of May, 1911, but nevertheless a prosecution for obtaining money on that check continued to exist until the money was actually obtained; and the Government is forced to contend that the conspiracy continues after the substantive offense has terminated. And the Government is also forced to contend that acts subsequently done by defendants in the way of settlement may be regarded as overt acts.

The principles upon which we contend have been continuously reiterated throughout the reports and from their context, certain conclusions are irresistibly drawn. In the first place, it is clear and certain that the mere allegations in an indictment, that certain facts are objects of the conspiracy, or that certain acts are overt

acts thereof, are immaterial, if, as a matter of law, these facts are not the objects of the conspiracy, or the overt acts alleged do not effectuate the real object of the conspiracy.

Further, the right is granted by these authorities, as a matter of law, to analyze, on an appeal, the facts alleged as objects of the conspiracy and the acts alleged as overt acts, to see whether or not such facts and acts do, or do not, as a matter of law, constitute the object and overt acts respectively.

Again, the distinction must be continually emphasized between a finished and completed conspiracy and its continuing result.

Finally, the principle that the overt acts must precede the consummation of the conspiracy, has become so axiomatic in our Federal Law of Conspiracy, that mention thereof need hardly be made.

Applying the law of the cases to the facts of the case at issue, forces the conclusion that the Statute of Limitations has barred the prosecution in this case. In our analysis of the facts in relation to the law, we will first consider the facts pleaded in the indictment as objects of the conspiracy. The indictment pleads the following facts as objects:

1. That the said Meyer should with fraudulent intent, issue and cause to be issued by the United States Navy Yard a requisition for the purchase for use of a large quantity of zinc.

2. That he should place in said requisition as the estimated price of such zinc a price in excess of the fair market value thereof.

3. That he should place and cause to be placed in said requisition as the time in which the successful bidder should deliver the zinc so short a time of delivery that none but the Great Western Smelting & Refining Company or W. A. Corder & Company could comply with the requirements.

4. That the said Meyer should notify Kettlewell, Goldberg, Corder and Silverstone of the progress of the requisition, so that they would be able to prevent legitimate competition.

5. That Silverstone should represent a certain alleged mercantile establishment (a subsidiary concern of the Great Western Smelting & Refining Company), and should at the proper time file with the United States Navy Office a proposal and bid to furnish materials at a price in excess of the true market value thereof.

6. That when the requisition should reach the United States Navy Pay Office, Kettlewell should send out proposals containing specifications to a list of merchants which should contain the names of no merchants other than the Great Western Smelting & Refining Company, the W. A. Corder Company and the Fowler Metal Company, except names of merchants known to be unable to furnish the articles.

7. That Kettlewell should, with fraudulent intent, examine the bids and so manipulate the bids of others that the contract should be awarded to the Great Western Smelting & Refining Company, W. A. Corder & Company, or the Fowler Metal Company.

8. That Kettlewell should recommend to the Pay Master of the United States to have accepted, and should arrange to have accepted, the bid and proposal of the Fowler Metal Company.

9. That Meyer should arrange to have the zinc which would be forwarded to the United States Navy Yard at Puget Sound, Washington, accepted without question, and that Kettlewell should thereupon recommend and secure the approval of the account, AND SHOULD RECOMMEND AND SECURE THE ISSUANCE BY THE PAY MASTER OF THE UNITED STATES NAVY OF A CHECK, PAYABLE TO THE ORDER OF THE FOWLER METAL COMPANY, FOR THE AMOUNT APPEARING TO BE DUE THE SAID FOWLER METAL COMPANY, AND SHOULD ARRANGE TO HAVE SAID CHECK DELIVERED TO SAID E. SILVERSTONE OR SAID EMAR GOLDBERG.

The succeeding allegation is merely a repetition of what follows, and is merely a conclusion of law as to what was the object of the conspiracy. These mere conclusions of law do not add to the indictment. The

charging part of the indictment alone controls. The conspiracy—the charging part of the indictment, commences at page 2 of the transcript and terminates with the name "Goldberg" appearing upon page 12. All that follows, aside from the overt acts, is merely descriptive as to the purpose of the scheme, which is elaborately set out.

The pleader in this case has completely overlooked the plain distinction of law between the substantive offense and the offense of conspiracy. In the case at bar, let us ask, "what is the substantive offense?" The substantive offense was not the cashing of the check. The substantive offense, if the indictment is to be believed, was to gain physical possession of the check. This necessarily had to be preceded by its issuance. The conspirators ceased concerning themselves over the transaction the moment the check was delivered. They had gained that which they had sought to gain. They had accomplished the very purpose of their conspiracy, and the mere cashing of the check was to enable them to settle with their co-conspirators. It is unnecessary to waste any further time upon this subject. It must be conceded that the overt act should be directed to the attainment of the object of the conspiracy. And when that object is attained, the object of the conspiracy in the sense of the statute is effected.

And the indictment clearly points out that the object of the conspiracy was to sell to the Government materials at unreasonable prices, and to receive therefor

the Government's check in payment. If this check had been lost, and the conspirators had taken steps to find it, had inserted an advertisement in some newspaper, would this act be one in furtherance of the conspiracy? If one of the co-conspirators had caused the check to be certified by the bank upon which it was drawn, would it be an act in furtherance of the conspiracy?

What has the depositing of the check to do with making the Great Western Smelting & Refining Company the successful bidder? They were successful bidders long prior to the depositing of the check. What had the cashing of the check to do with the acceptance of their bid? Their bid was accepted long prior to the cashing of the check. What had the cashing of the check to do with the awarding of the contract to the Fowler Metal Company? This contract was awarded long prior to the issuance of the check. What had the depositing of the check to do with the acceptance of the goods by the government? These goods were accepted long prior to the issuance of the check. Every single act of con-

What has the cashing of the check to do with making the Great Western Smelting & Refining Company the successful bidder? They were successful bidders long prior to the cashing of the check. What had the cashing of the check to do with the acceptance of their bid? Their bid was accepted long prior to the cashing of the check. What had the cashing of the check to do with the awarding of the contract to the Fowler Metal Company? This contract was awarded long prior to the

issuance of the check. What had the cashing of the check to do with the acceptance of the goods by the government? These goods were accepted long prior to the issuance of the check. Every single act of confederacy against the Government in this particular transaction was completed long prior to the cashing of the check. The Government had the materials for the purchase of which it had contracted, and had delivered the check in payment therefor, and the check was accepted in payment therefor. The transaction was not only closed in point of fact, but was closed upon the books of the Government. The Government's books show that on the 26th day of May, 1908, this check was issued in payment of these goods, and thus the transaction was absolutely completed.

THE FACT THAT ONE OF THE BIDS WAS IN THE NAME OF THE FOWLER METAL COMPANY, A SUBSIDIARY CONCERN OF THE GREAT WESTERN SMELTING & REFINING COMPANY, DID NOT RENDER SUCH BID ILLEGAL, OR AGAINST THE POLICY OF THE LAW.

In order to escape the importunities of Kettlewell, who was doing business with the Government under assumed names, selling the Government supplies under the names of Peter Brandt, and Smith-Hunt & Company, Mr. Goldberg, with the consent of the head of the Great Western Smelting & Refining Company, bid on the materials in the name of the Fowler Metal Company. Section 3722 of the Revised Statutes permits this as shown.

The testimony afterwards quoted shows that the Fowler Metal Company was engaged in a similar business to that of the Great Western Smelting & Refining Company; and even if the bid was in the name of a clerk of the Great Western Smelting & Refining Company, it would not have been unlawful. The bid would merely have been rejected.

ACCORDING TO THE TERMS OF THE INDICTMENT, AND OF ALL RULES OF COMMON SENSE, THE OBJECT OF THE CONSPIRACY WAS ATTAINED BY THE RECEIPT OF THE CHECK, BECAUSE THE CHECK CONSTITUTED PAYMENT, AND NO FURTHER RELATIONS WITH THE GOVERNMENT WERE NECESSARY AFTER ITS DELIVERY.

In civil cases, the Statute of Limitations has been held to run from the date of payment by check, and not from the date upon which the check is cashed. How, therefore, can the subsequent handling of this government obligation affect the conspiracy or extend the statute of limitation?

In *McCluny* v. *Silliman,* 28 U. S. 269, Mr. Justice McLean said:

> "Of late years the courts of England, and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek re-

dress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."

EVERY PRESUMPTION FAVORS THE PROPOSITION THAT THE CHECK CONSTITUTED PAYMENT AND THUS COMPLETELY TERMINATED ALL TRANSACTIONS BETWEEN THE GOVERNMENT AND THE PLAINTIFFS IN ERROR.

An exceptionally strong indication in favor of the presumption that the check concluded the conspiracy because it constituted final payment, is to be found in the way such obligations are treated by the United States Government itself. How the Government deals with its obligations of this nature is best shown by section 306 of the Compiled Statutes of 1901. These sections read as follows:

"Sec. 306. LIABILITIES OUTSTANDING THREE OR MORE YEARS.—At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depositary of the United States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall

> be deposited with the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'

In other words, applying to the case at bar, if the check was not cashed within three years by the conspirators, by operation of the law the money due them from the Government would be placed to their account in the United States Treasury, and would remain there to their account just as if they had deposited the money there as in a bank, or had a certified check accepted by a bank. Nothing had to be done by them to cause this to be done. It would have been done by force of these sections,—sections 306-308 of the Compiled Statutes to be done. It would have been done by force of this section—section 306 of the Compiled Statutes of 1901.

The United States Treasury is always solvent and secure, so that the money is always secure; while a private bank cannot be relied on for anything near such security and solvency. In the light of these circumstances, was there any need for haste on the part of the defendants here to cash their check?

THE GOVERNMENT RECEIPT WAS EVIDENCE THAT THE CHECK CONSTITUTED ABSOLUTE AND NOT CONDITIONAL PAYMENT OF THE CLAIM.

The charge in the indictment is that the defendants conspired together to obtain this precise Government

check, and surely payment by check of the United States Government raised a presumption of absolute payment, especially in a criminal case, and the benefit of the doubt is given to the defendants. We have not only the delivery of the check itself, but we have the further proof that on May the 26th, 1908, a receipt was given for the check and the bill was marked "paid." Here we find an absolute agreement upon the part of the defendants to receive the check as payment of the account. These facts conclusively show the check was given as absolute payment, and was tendered and received as absolute payment of the claims of the defendants.

The evidence in this case conclusively shows that the receipt of the check absolutely terminated the transaction between the conspirators and the government, because it clearly appears that the check was accepted as absolute and final payment of the claim in question.

The receipt is most conclusive evidence that the check was received in payment. In many doubtful cases such a receipt has absolutely thrown the decision in favor of the parties presenting that point. In *Fowler* v. *Ludwig,* 34 Me. 455, Chief Justice Shipley said:

> "The facts relied upon to repel and overcome the presumption of payment and the corroborative testimony, were not deemed sufficient to authorize the court to determine that the orders were not received in payment."

In this case a receipt was introduced in evidence to show that the check was received as payment.

In *Real Estate Bank* v. *Rawdon,* 5 Ark. 558, at page 569, the Court, by Mr. Justice Dickenson, said:

> "It is perfectly clear that if the principal settles with the agent on the faith of a receipt in full as for money, he is entirely discharged. Does the form of the receipt vary the principle? The receipt here is as if the security were an absolute payment for Rawdon, Wright and Hatch received for the notes precisely as they received for the money. They realized the principle and elected to take the checks respectively, and each, upon the faith of the receipt, settled with the principal, the bank. No doubt taking a note for a pre-existing debt is not conclusive evidence of payment unless it is expressly agreed to be taken as payment, and at the risk of the creditor. (*Tobey* v. *Barber,* 1 J. R. 68; *Arnold* v. *Camp,* 12 J. R. 407.) Did the receipt here warrant the bank in settling with Williamson? No receipt is conclusive evidence of absolute payment. A receipt in full by cash may be explained or contradicted as well as a receipt in full by note. In many cases it has been held that the presumption that the check was intended as payment arose from the evidence of the acts of the parties in giving and receiving the check."

In *Archibald* v. *Argall,* 53 Ill. 307, the Court said:

> "It is the established doctrine in this court that the mere giving of a note does not of itself extinguish a precedent debt, whether it be an account or other demand. *Rayburn* v. *Day,* 27 Ill. 46; *White* v. *Jones,* 38 Ill. 159. In such a case, it is a question of intention. It is true, the intention need not be manifested by an express agreement, but may be inferred from the circumstances attending the transaction, and is a question for the jury."

In *Bailey* v. *Partridge,* 34 Ill. 188, 27 N. E. 89, it is said:

> "If it be true that the check was given as intimated in this letter, and it was accepted as payment, and a receipt given showing full payment, nothing more was required to establish *prima facie* payment."

In *Blair* v. *Wilson,* 28 Grat. 165 (Va.), a check was given and received as cash, and credited to the debtor as cash, and the creditor deposited the check the day it was received. It was not paid, owing to the evacuation of Richmond by the Confederate Army and the subsequent fire. It was held that if there was any doubt as to the intention of the parties in this giving and receiving the check, it was a question for the jury. The court said:

> "While, however, the giving of the check by a debtor to his creditor is generally presumed to be only a provisional or conditional payment of the debt, for which it is given, yet such check by agreement between the parties may be given and received in full payment and absolute discharge and satisfaction of the debt.
>
> "I do not find this proposition controverted anywhere except in New York, where it seems to be held that such an agreement is invalid because without consideration. The authorities in all the other States seem to uphold such an agreement when made. In some of the cases it is said the agreement must be 'express;' in others it must be 'special;' while in many others it is said that it may be either 'express or implied.' The authorities touching such

agreements are collected and classified in 2 Parsons on Bills and Notes, 159, 160, 161, 162, Note T, and as there given, relate mostly to bills of exchange and promissory notes. I see no good reason, however, why the rule should not apply as well to a check as to a bill or note, nor why the agreement may not as well be implied as expressed."

In *Bullion & Exchange Bank* v. *Hegler,* 93 Fed. 890, Judge Morrow on page 894 said:

"It is now well settled by the authorities that the statute of limitations is to be upheld and enforced, not as arising merely upon the presumption that from lapse of time the debt has been paid, or released, but upon the broad ground that it is a statute of repose, for the peace and welfare of society, and is therefore to be regarded favorably. *Bell* v. *Morrison,* 1 Pet. 351, 360; *McCluny* v. *Silliman,* 3 Pet. 270; *Shepherd* v. *Thompson,* 122 U. S. 231, 234, 7 Sup. Ct. 217; *Spring* v. *Gray,* 5 Mason 305, 22 Fed. Cas. 978, 984; *McCornish* v. *Brown,* 36 Cal. 180, 184."

See, also,

Wood on Statute of Limitations, 3d Ed., Sec. 4;
Merrill v. *Monticello,* 66 Fed. 165.

The statute as applied to criminal prosecutions is no less based on sound principles of public policy and wisdom than when applied to the limitation of civil actions. In *Wood on Statute of Limitations,* 3d Ed., Sec. 13, it is said:

"In reference to crimes, where the Statute fixes a period within which an indictment for certain

offenses shall be found, while perhaps it cannot technically be said that the criminal, by the lapse of the statutory period, has acquired a vested right under the statute, yet it may be said that the State, though retaining the power to prosecute and punish for the crime at any time before the statute has run thereon, yet by neglecting to do so, is to be treated as having condoned the crime, so that it is afterwards estopped from prosecuting for it, as much as it would be from withdrawing an absolute and unconditional pardon after it had once been granted and delivered. But it has recently been held by a court of high authority that the same principle applies in this respect in criminal as in civil cases."

The learned author here refers to the case of *Moore* v. *State,* 40 N. J. L. 384, and quotes from the opinion of J. Dixon therein, in the following note:

"The statute of limitation, in declaring that no person shall be prosecuted, tried, or punished for an offense, unless the indictment be found within two years after the crime, in effect enacts that when the specified period shall have arrived the right of the State to prosecute shall be gone and the liability of the offender to be punished—to be deprived of his liberty—shall cease. Its terms not only strike down the right of action which the State had acquired by the offense, but also removes the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the

State has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes, they annihilate the State's power to punish and restore the offenders' rights to their original status." See *Dinckerlocker* v. *Marsh,* 75 Ind. 548.

Another note reads as follows:

"Statutory Crimes, S. 266. The doctrine stated by this test-writer is not only without any foundation in reason, but is also wholly unsustained by authority. Dixon, J., in the case last cited, in commenting upon this statement pertinently said: 'Evidently this doctrine would upset the uniform train of decisions in civil cases, and moreover it would be a strained and unnatural construction of our act, to say that it simply withholds jurisdiction from the courts. Its language is "no person shall be prosecuted, tried, or punished." It does not relate to the courts but to the person accused. The answer, which under it the respondent must make to an accusation before the tribunal which once had the right to punish him, is not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment or acquit. And probably no one would contend that, after such judgment, any change in the law would legally subject the defendant to a second prosecution. Yet an acquittal by a court without jurisdiction is void. 1 Hawkins, P. C. C. 35. It cannot be maintained, then, that the act impairs jurisdiction.'"

A very recent expression on this subject is to be found in the case of *Gompers* v. *United States,* Advance opinions United States Supreme Court, October term 1913, page 696, in which the Supreme Court of the United States said:

> "The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. By analogy, if not by enactment, the limit is three years. The case cannot be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. *Adams* v. *Woods,* 2 Cranch. 336, 340-342, 2 L. ed. 297-299: 'It is contended that the prosecutions limited by this law are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offense. It is not declared that no indictment shall be found . . . But it is declared that "No person shall be prosecuted, tried, or punished." . . . In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.' "

The question of whether or not the statute of limitations has run must be tested by the averments of the indictment concerning the alleged conspiracy, and it clearly appears from these averments that the conspiracy was to enable the Great Western Smelting & Refining Company and the W. A. Corder Company to have their bid accepted without question, and to secure the approval of the amount of their bid by the proper officials of the Government, and to secure the recommendation and issuance by the paymaster of a check payable to the order of the Fowler Metal Company, a subsidiary concern of the Great Western Smelting & Refining Company, and the delivery of that check to either Silverstone or Emar Goldberg. The indictment reads:

> "That said J. A. Kettlewell should recommend to the Paymaster of the United States Navy Pay Office at Seattle, Washington, and arrange to have accepted the bid and proposal of said Fowler Metal Company so to be offered and filed by the said E. Silverstone, and should arrange to have awarded to said Fowler Metal Company the contract for the furnishing of said zinc, rolled sheet, boiler plates, so to be requisitioned, as aforesaid; that said Edwin F. Meyer should arrange to have said zinc, rolled sheet, boiler plates, which would be forwarded to the United States Navy Yard, Puget Sound, by said Great Western Smelting and Refining Company and said W. A. Corder Company in fulfillment of the Fowler Metal Company contract, accepted without question, and said J. A. Kettlewell should recommend and secure the approval of the account as shown by a certain certified bill to be filed, and

caused to be filed, by said E. Silverstone, with the United States Navy Yard, Puget Sound, Washington, purporting to be the certified bill of the Fowler Metal Company, showing delivery of said zinc, rolled sheet boiler plates, and the acceptance of same at said Navy Yard, Puget Sound, and that none of said zinc, rolled sheet boiler plates had been paid for, and should recommend and secure the issuance by the Paymaster at the United States Navy Pay Office at Seattle, Washington, of a check payable to the order of the said Fowler Metal Company for the amount appearing to be due the said Fowler Metal Company according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

(Indictment, pp. 11-12, Trans.)

The crime in this case was consummated in point of fact before the issuance of the check, the issuance and delivery of the check being RESULTS ONLY of the conspiracy. Under the decisions of the Supreme Court of the United States, in *U. S.* v. *Williamson,* 207 U. S. 425, and in the later case of *United States* v. *Biggs,* 211 U. S. 507, we are satisfied that this contention cannot be successfully disputed. In all of these cases the alleged co-conspirators were still acting, but acting amongst themselves, and not conspiring against the Government.

The approximate object of the conspiracy was the obtaining of the award and the delivery of the check, and this we have shown was accomplished on May the 26th, 1908. Unquestionably, the depositing of this check

and obtaining something in lieu thereof, was a mere result of the conspiracy, and not a part of the conspiracy itself. This is clearly pointed out in *United States* v. *Kissell,* 218 U. S. 601, in which a crime is distinguished from its results.

The indictment in this case alleges that the conspiracy was continuously in process of execution from about the first day of April, 1908, to and including the second day of June, 1908. It clearly appears, however, from the indictment itself, and the undisputed proofs that in April, 1908, the materials sold to the Government were in the possession of the defendants; that a requisition was placed in April, 1908; that proposals and bids were filed in April, 1908; the recommendation to the Paymaster to have accepted the bids and proposals were filed in April, 1908; and that all these acts were done long before the delivery of the check, which way May the 26th, 1908.

The alleged overt acts set out in the indictment deal with nothing other than the check. The last overt act set out in the indictment that Goldberg on or about the 1st day of June, 1908, had in his possession a check, surely is not an overt act in furtherance of any conspiracy. Nor did the fact that Silverstone, on the 1st day of June, 1908, deposit the check in the bank, have anything to do with the conspiracy. No single overt act is set forth in the indictment which had for its object the carrying out of the alleged conspiracy set out in the indictment. The indictment, on its face, showing

that this check was delivered on or about June the 1st was asserted to avoid the bar of the statute, the proof showing that it was delivered on May the 26th. Instead of the possession and delivery of the check being an act to further the conspiracy, it was a mere result flowing from the conspiracy.

Unless this be true, then the Court must hold that every result of a conspiracy is an overt act. If at any time a conspirator has in his possession the avails of a crime, so long as he has these avails he may be subject to prosecution for conspiracy, although the substantive offense may be barred.

Admittedly, in this case, the substantive offense of presenting a false claim against the Government was barred by the Statute of Limitations long before May the 31st, 1911.

The introduction in evidence of the cashing of the check was absolutely immaterial evidence, as the cashing of this check did not tend to accomplish the object of the conspiracy, which was to procure the award for the lot of materials to the defendants, and perhaps the obtaining of the check. What had the cashing of this check to do with the obtaining of this award? What had the cashing of this check to do with the delivery of the check? What relation did it bear to the conspiracy set out in the indictment?

In *Fain* v. *United States,* 209 Fed. 531 (1913), the Circuit Court of Appeals, for the eighth circuit, said:

> "There are many reasons why the two statements in the affidavits regarding the sales of the property to Smith and Hennold, respectively, even if false, were immaterial. They did not tend to accomplish the object of the conspiracy to keep the land out of the public domain and beyond the reach of other entrymen; but if they had any tendency, it was to remove the existing entries, and to open the land to entry by others. Moreover, it was not material whether the homesteaders had sold their relinquishments or not; for, if they had, they had the right to purchase them again and to maintain their homestead rights and their entries until the latter were cancelled by contests or by the filing of their relinquishments. The false statements were not material to prove perjury because they related to an immaterial issue, and because that offense was not charged in the indictment and its commission was not in issue. It is not a criminal offense for a litigant to delay the administration of the law by asserting, even under oath, in his pleading or proof the existence of a fact which did not exist. If it were, one or the other of the parties in many a contested lawsuit would either be deterred from asserting the existence of facts, the proof of which would be essential to his rights, but doubtful, or would be liable to punishment for asserting their existence if he failed to prove them. No sound reason is discovered for the introduction in evidence or the consideration by the jury of the affidavits and contests of the entries of Kammerer, Strunk, or Rogers, or of their relinquishments or of the entries themselves.

They should have been excluded from the consideration of the jury in the trial below."

* * * * * *

"Over the objection of Fain that it was incompetent evidence against him, a letter to Babb was received in evidence, which had been written by Baker on October 14, 1910, 23 days after Babb's relinquishment was filed and his land was entered by Jenkins, in which letter Baker stated his sale of Babb's relinquishment, and that as soon as he could cash out, he would add up Babb's notes and the amounts of cash he had loaned him, and if they could get any balance, would send it to him. The letter was not competent evidence against Fain, because it was not written to effect the object of the alleged conspiracy, but to narrate how that object had been attained after it has been reached, and such a narration by a co-conspirator is no evidence against his fellow. While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end, either by success or failure, are inadmissible in evidence against his co-conspirators. *Logan* v. *United States,* 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown* v. *United States,* 150 U. S. 93, 98; 14 Sup. Ct. 37, 37 L. Ed. 1010; *Lonabaugh* v. *United States,* 179 Fed. 476, 103 C. C. A. 56, 61."

The rule is well established that after a conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.

Was not the United States defrauded when the check was delivered? The answer must be in the affirmative. And this being so, did not the conspiracy to defraud terminate prior to that time?

2.

THE COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE PERSISTENT OBJECTION OF THE DEFENDANTS TO EVIDENCE AS TO SALES OF ZINC AT VARIOUS TIMES TO VARIOUS PURCHASERS, FOR THE PURPOSE OF ESTABLISHING THE REASONABLE VALUE OF THE ZINC SOLD TO THE GOVERNMENT.

The charge in the indictment was that the fraudulent scheme contemplated a requisition for the purchase for use in the Navy Yard of a large quantity of zinc, rolled sheets and boiler plates, and should place and cause to be placed in said requisition on the estimated cost of said zinc, rolled sheets and boiler plate a price in excess of the fair market value thereof. It was the theory of the pleader that the schemes of the defendants were to obtain for themselves unreasonable and unconscionable profits.

The sale to the Government was made between the first day of April and the 26th day of May, 1908. The government had been defrauded by having foisted upon it, under its claim, materials at unreasonable prices in exchange for a check delivered on May 26, 1908.

To prove that we have made unreasonable profits, the Government introduced in evidence a large num-

ber of sales sheets of the Great Western Smelting & Refining Company's books, showing sales of zinc to various customers and customers of that concern at times long prior to the date of the sale to the Government of the zinc in question. The Government was also permitted to show sales to customers of the Corder Company for the same purpose. This testimony was constantly objected to and the objections overruled.

IT WAS NOT SHOWN BY THE GOVERNMENT THAT THE OTHER SALES OFFERED BY IT IN EVIDENCE TOOK PLACE UNDER THE SAME CONDITIONS OR WERE SUBJECT TO THE SAME CIRCUMSTANCES AS THE SALE OF THE ZINC IN QUESTION. ON THE CONTRARY THE CONDITIONS AND CIRCUMSTANCES WERE SHOWN BY THE EVIDENCE TO BE FUNDAMENTALLY DIFFERENT.

The zinc furnished in the case at bar was of a peculiar kind and dimensions. As shown by the testimony of Mr. Nagus, the prices of zinc fluctuated from time to time, particularly during the six months preceding this sale to the Government. The Government, before purchasing this zinc from the Great Western Smelting & Refining Company, endeavored to purchase it from the only manufacturer who had it, the Matheson & Heggler Zinc Company, and their offer to purchase was declined. Mr. Nagus' testimony follows:

"MR. ALLEN.—Well, give then the specification of the plates.

"MR. SCHLESINGER.—'5,000 pounds ½ by 24 by 28 inches; 5,000 pounds ½ by 24 by 26 inches; 5,000 one inch by 26 by 36 inches; 4,000 one inch by 24 by 48 inches. Referring to the last item will say that the largest we can furnish of one inch plate is 24 by 36, and we therefore telegraphed you accordingly, as per enclosed press copy, at the same time quoting you $5.08 La Salle for the additional carload, less the usual discount, and your mention that we intend to allow this price to apply on present carload orders. We would add that in quoting prices on rolled zinc plates the same are always for prompt acceptance, excepting when same is contingent upon the awarding of contracts by the Government, and while we are able to give you a reduction in price on the present order, at times market may advance where the order is not placed promptly, owing to fluctuations in the spelter price. We await your reply with reference to one inch plates and hope to be favored with your order for additional carloads.'

"Q. What do you mean by the phrase here 'owing to fluctuations in the spelter price'? What is spelter?

"A. Spelter is pig zinc.

"Q. Spelter is pig zinc. Do you manufacture zinc?

"A. We do, yes.

"Q. And the price of spelter, which was the basic material, those prices fluctuated from time to time?

"A. Yes, sir.

* * * * * *

"MR. SCHLESINGER.—As a matter of fact, in selling to the Great Western Smelting Company at various times, did not your price, as shown by these letters, fluctuate?

"A. Yes.

"Q. From between six to $7.40 per hundred pounds?

"A. Yes, that is right.

"Q. And, for all that you know, they might still fluctuate and become higher in the future, dependent upon trade condition?

"MR. SCHLESINGER.—So far as you know, without being able to dip into the future, because you have no prophetic vision, they might still further fluctuate and become higher or lower as conditions warrant?

"A. Yes, sir.

"Q. You are not able to say now, are you, with any degree of definiteness, what you will sell these plates for three months hence?

"A. No.

"Q. In other words, as a man of common sense, you know that any business man might expect fluctuations in prices for merchandise?

"A. Yes.

"Q. If there is an over-demand and a small supply prices raise, do they not?

"A. Yes.

"Q. If there is a large supply and a small demand prices lower, do they not?

"A. Generally speaking, yes.

Hiram S. House testified that he was an expert bank accountant for the Department of Justice. (P. 530, Trans.) He was handed the Great Western Smelting & Refining Company's book, "Government Exhibit 28," the same being the receiving book of the Great Western Smelting & Refining Company. (Trans., p. 535, Assignments of Error, Trans., p. 1455.) His at-

tention was then called to various sales sheets contained therein, and he was asked to state by referring thereto the various prices paid for zincs at various other times than those stated in the indictment, at the dates upon which the zincs in question were bought. (Trans., p. 537, Assignments of Error, Trans., p. 1456.) His testimony was objected to upon the ground that Mr. House was not a man knowing values, but simply an expert accountant, and that his testimony as to the value of goods at other times than the one in question, or even of goods at the time in question, was not competent evidence, not only because Mr. House was merely an expert accountant and did not know values, but because the conditions existing at those times were not shown by the exhibits in question. (Trans., p. 541, Assignments of Error, Trans., p. 1457.) The testimony, however, was admitted, and Mr. House testified that the books showed that on September 4th, 1907, sales of zinc to the John Simms Metal Works were made of 4587 pounds at $9.50. Continuing to read from the books, he testified that the same showed a sale on September 4th, 1907, to the Pacific Engineering Company of 1036 pounds at $9.55—$958.44. (Trans., p. 542, Assignments of Error, Trans., p. 1458.) In the same manner the witness went on to testify as to the prices paid in numerous other instances for zincs of numerous other sizes and numerous other qualities at various times from September 4th up to March 21st, 1908. (Trans., pp. 542-569, Assignments of Error, Trans., pp. 1458-

1470.) He testified in the same manner from the sales sheets of the W. A. Corder Company. (Trans., p. 547, Assignments of Error, Trans., p. 1459.) His testimony showed that many of the firms to whom zincs were sold at various other times were jobbers or private individuals, while the United States Navy Yard was neither one nor the other and different conditions applied where zincs were sold to jobbers or to private individuals. (Trans., pp. 549-553, Assignments of Error, pp. 1461-1463.) Moreover, it appeared that zincs sold to the government had to be shipped in paper boxes, separate, across the Sound, while those to jobbers and to private individuals were not required to be forwarded in the same manner as those to the Navy Yard. (Trans., p. 549, Assignments of Error, Trans., p. 1462.)

The importance of this evidence on the minds of the jury is clearly evidenced by the fact that some of the jurors particularly inquired as to the dates of the various transactions. Here the jury were given evidence of sales of zinc starting on September 4th 1907; in other words, the Government was allowed to show sales occurring eight months prior to the transaction in question,—sales to jobbers, with the conditions of the market practically unknown, supply and demand not being referred to,—and this for the purpose of showing that we had charged the Government an unconscionable profit. We have all along contended that the Government did not pay an unreasonable profit for the zinc in question. The next sale in point of date was November

the 20th, 1907, the kind of zinc plates not being similar either in size or quality, so far as disclosed by the testimony. This testimony, we submit, was covered by various objections, and was exceedingly prejudicial. The same question arose in the case of *In re Thompson,* 28 N. E. 390, before the Court of Appeals of New York, and Justice Parker, delivering the opinion of the Court, said:

> "This question has been presented to courts of last resort in several of the States, but not with the same result. In Massachusetts, New Hampshire, Illinois, Iowa and Wisconsin it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation. *Gardner* v. *Brookline,* 127 Mass. 358; *Packing etc. Co.* v. *City of Chicago,* 111 Ill., 651; *Town of Cherokee* v. *Land Co.,* 52 Iowa 279; 3 N. W. Rep. 42; *Railroad Co.* v. *Greely,* 23 N. H. 242; *Washburn* v. *Railroad Co.,* 59 Wis. 364, 18 N. W. Rep. 328. While in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia, and California, it is held that sales of similar property are not admissible for the purpose of proving the value of property about to be taken. *Railroad Co.* v. *Hiester,* 40 Pa. St. 53; *Railroad, etc., Co.* v. *Bunnell,* 81 Pa. St. 414; *Railroad Co.* v. *Ziemer,* 124 Pa. St. 560, 17 Atl. Rep. 187; *Railroad Co.* v. *Benson,* 36 N. J. Law. 557; *Railroad* v. *Pearson,* 35 Cal. 247-262; *Railroad Co.* v. *Kieth,* 53 Ga. 178. The reasons assigned for the conclusion reached in the cases last cited are, in the main, that the test in legal proceedings is, what is the present market value of the property which is the subject of controversy?

It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of the land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out, so far as the question of damages is concerned, by proof of a single sale, and thus the agreement of the parties which may have been the result of necessity or caprice would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show,—First, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance,—such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market; or, on the other hand, that the price paid was excessive, and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the trans-

actions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

"Our attention has not been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington* v. *Attrill,* 118 N. Y., 365, 23 N. E. Rep. 544, the defendants attempted to prove the value of certain seaside property by showing the value of other property of the same general character situated in different places, and Judge Bradley, speaking for the court, said: 'It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy.' The question was not necessarily before the court in *Mayor, etc.,* v. *McCarthy,* 102 N. Y. 630-638, 8 N. E. Rep. 85; but Chief Justice Ruger, referring to the question whether the price paid on sales of real estate between individuals is admissible as evidence of value, said: 'We think it quite clear, however, that such price is not, in any view, competent evidence of value.' In *Blanchard* v. *Steam-Boat Co.,* 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon* v. *City of New York,* (Sup. Ct.) 13

N. Y. Supp. 864, the objection was that other evidence should be produced to establish the fact sought to be proven (page 866) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use made of property immediately adjoining, may not be shown by evidence of the price paid for similar property. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property not only as to description, but as to its availability for use. *Chandler* v. *Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Gardner* v. *Brookline,* 127 Mass. 358-363, and cases cited."

MR. HOUSE, BY WHOM THIS TESTIMONY WAS PRODUCED, WAS AN EXPERT ACCOUNTANT, AND WAS NOT AN EXPERT IN OR COMPETENT TO TESTIFY AS TO THE MARKET VALUE OF ZINC.

It will be borne in mind that Mr. House was not an expert in the matter of sales of zinc. They had experts present in the person of Mr. Nagus and other dealers in zinc. They simply sought to establish values by the introduction of sales sheets of sales to other customers. No case has been found which recognizes the admissibility of any such testimony. Indeed, it was incumbent upon the Government to show that the conditions of these sales were similar to the conditions surrounding the sales of zinc to the Government at the time in question,—size of zinc, quality of zinc, freight rates, conditions of the market, supply and demand, and many other proper elements of consideration. This question also arose in *Schradsky* v. *Stimson,* 76 Fed. 730. In this case Circuit Judge Thayer of the Circuit Court of Appeals, said:

> "Touching this latter ruling it is only necessary to say that the opinion expressed by the witness concerning the reasonable rental value of the premises occupied by the defendant was based on the fact that they were located in a sightly building, at the junction of two streets (Fifteenth and Larimer), on both of which streets there were street-car lines; also, on the further facts that the building fronted on both streets, and was provided with steam heat, and was for these reasons a very eligible business location. No evidence was elicited from the witness, or attempted to be elicited, that the rent that had been charged for stores Nos. 1445, 1449 and 1451, on Larimer street, was a reasonable rental, or that the building in which the stores were located, and the surroundings thereof, were of such char-

acter as to render it probable that the rent charged and collected for such stores was a fair criterion by which to determine the reasonable rental value of the premises in controversy. It is a well known fact that many circumstances may, and often do, affect the rental value of buildings located in large cities, and that it frequently happens that premises of the same size command a different rental, although they are located in the same neighborhood and front on the same street. We think, therefore, that the testimony sought to be elicited from this witness by the aforesaid question was properly excluded. It has no necessary tendency to establish the reasonable rental value of the premises in controversy, and might have been very misleading, unless further evidence was produced, which was not offered, showing that the situation of the respective properties was such that the rent paid for one was a fair rental for the other. Moreover, the testimony was objectionable on the further ground that it had a marked tendency to burden the case with collateral issues; for, beyond all question, if it had been admitted, the plaintiff would have been entitled to show what was the reasonable rental value of the property referred to by the witness, between which and the property in controversy it was proposed to institute a comparison."

Unquestionably, an expert might testify as to the market value of goods at a given time, and then on cross-examination questions of other sales of similar articles at periods not too remote could be inquired into, but in no instance has the rule been extended. In *Chaffee* v. *United States,* 85 U. S. 21 L. Ed. 912, the Court said:

> "All the certificates were admitted without distinction. When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently, a similar objection was taken to each of the certificates, on a motion to exclude them from the jury.
>
> "The books were not public records; they stood on the same footing with the books of the trader or merchant. The fact that the lease was from the State did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the State. Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.
>
> "And that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reason of the process of commission of the court. The testimony of living witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in

open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.

"We do not deem it important to cite at length authorities for the rule and its limitation as we state it. They will be found in the approved treatises on evidence, and in the numerous cases cited by counsel on the argument. In this court, the case of *Nicholls* v. *Webb,* reported in 8 Wheat., 326, and that of *Ins. Co.* v. *Weide,* reported in 9 Wall., 677 (76 U. S. XIX, 810), are illustrations of the rule. In the first case, it was held that, after the death of a notary, his record of protests was admissible upon proof of his death and handwriting, the court observing that it was the best evidence the nature of the case admitted of, that the party being dead, his personal examination could not, of course, be had, and that the question was whether there should be a total failure of justice, or secondary evidence should be admitted to prove the facts. In the second case, the books and ledger of the plaintiffs were admitted in evidence to show the amount and value of goods lost by the burning of their store, upon the testimony of the parties who made the entries that they were correct, the court holding that the books 'would not have been evidence per se, but with the testimony accompanying them, all objections were removed,' and referring to cases decided in the Supreme Court and Court of Appeals of New York in support of the ruling. In both of these cases the entries were made by parties personally cognizant of the facts. This knowledge of the party making the entry is essential to its admissibility. His testimony if living, would be rejected if ignorant of the facts entered,

and it would be strange if his death could improve its value in that respect.

"The cases of Fennerstein's Champagne (70 U. S. 145, XVIII, 121), and Cliquot's Champagne, reported in 3 Wall. (70 U. S., 114, XVIII, 116), do not infringe upon this rule. Those were cases where it became necessary to establish the market value of certain wines in France and such value could only be ascertained by sales made by dealers in those wines in different parts of the country, and the prices at which they were offered for sale, and circumstances affecting the demand for them. It would not be proved by a single transaction, for that may have been exceptional; the sale may have been made above the market price, or at a sacrifice below it. Market value is a matter of opinion which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion prices—current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration. A party, without having been previously engaged in any mercantile transaction, may be able to give with great accuracy the market value of an article the dealing in which he has watched, and in stating the grounds of his opinion as a witness, he may very properly refer to all these circumstances, and even the verbal declarations of dealers. *Alfonso* v. *U. S.*, 2 Story, 426. Now, in the cases in 3d Wallace, statements of dealers in the champagne, or of agents of dealers, made in the course of their duties as agents, and letters from dealers, and prices-current, were admitted as bearing upon the point sought to be established—the market value of the wines. There is no analogy between these cases and the one at bar. What was the market value of the wines in France was, as already said, a matter of opinion. Whether the defendants had in their possession or custody, between certain dates, 200,000 gallons of

distilled spirits, or any other quantity, for the purpose of selling the same with a design to avoid the payment of duties thereon, was a question of fact, and not of opinion.

"If now we apply the rule which we have mentioned to the certificate books of the canal collectors, their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility."

It will be borne in mind that we were not concerned with the market value of zinc in September of the preceding year. That question was not before the court. We were simply dealing with the market value, if at all, of these precise goods in April, 1908, when sold to the Government. And to establish market value by seizing one's books and reading entries therefrom of sales to other customers, is absolutely unpredicated. It is certainly something not heard of in the annals of American jurisdiction. At the very most, these entries proved the values of the goods when they were sold; they did not prove the value of the particular zinc sold

to the Government at a later date. And this rule peculiarly applies to the case at bar, in view of the testimony of Mr. Nagus, a Government witness. The reason for this rule is very clearly stated by Justice Blatchford, in *U. S.* v. *Sixteen Cases of Silk Ribbons,* Federal Case No. 16,301, 27 Fed. Cases, 1102:

> "It is quite apparent, in this case, that the cost of the raw silk used in making these ribbons enters into the expense of making them to the extent of from seventy to eighty per cent. of the entire cost of manufacturing them; and, of course, the variation in the cost of making them must depend a great deal on the price of raw silk. It is also in evidence, both by Viollier and by the depositions on the part of the claimants, that there was a time, during the year 1866, when, in consequence of the apprehension of war, and of the existence of war between Austria and Prussia, there was an interruption of trade, the demand for ribbons lessened, and there was a fall in the price of raw silk; and that, after the war closed, raw silk advanced in price. As to when these things happened, I shall speak hereafter. I refer to the subject now, for the purpose of saying, that, if the claimants in this case purchased raw silk at low prices, and manufactured ribbons out of that silk, but did not have them completed and ready for the market until raw silk had advanced considerably, and if they afterwards made out their invoices of such ribbons on the basis of the cost of raw silk bought at those low prices, it is manifest that the cost of the goods so arrived at would not represent their actual market value at the time when they became a completed manufacture, which is what the law of the United States requires. It would undoubtedly represent the cost of the goods

to the manufacturer, because he procured his raw silk at a low price, and he had, or was entitled to, a market for his manufactured goods afterwards, at a price for those goods based upon an increased price of raw silk—a price to the benefit of which, as against him, the United States were entitled. This case furnishes an illustration of why the United States can never admit that a manufacturer shall invoice his goods at their cost to him, with a profit added, unless such cost, with the profit added, is in fact the actual market value of the goods when their manufacture is completed. He cannot invoice them at the price he paid for the raw silk which he put into the particular goods, with the other expenses of manufacture, and a profit added, unless the result is in fact the actual market value of the goods. If any such principle of valuation were to be admitted by the United States as cost with the profit added, the cost which, in reference to raw silk, the United States would have a right to insist upon in a case like the present would be a cost based upon a price for raw silk at the advanced rate at which it stood when the goods were completely manufactured ready for market; otherwise the United States would be defrauded of that to which they are entitled by law. Therefore it is that no individual has any right whatever under any circumstances to substitute in his invoice for the actual market value cost, with a manufacturer's profit added."

WHEREFORE, plaintiffs in error, because of prejudicial error appearing in the record, ask that the judgment be reversed.

Respectfully submitted,

KERR & McCORD,
BERT SCHLESINGER,
MORRIS & SHIPLEY,
A. R. BLACK.
Attorneys for Plaintiffs in Error.